Successive and additional measures to the TRC Amnesty Scheme in South Africa

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SUCCESSIVE AND ADDITIONAL MEASURES TO THE TRC AMNESTY SCHEME IN SOUTH AFRICA: PROSECUTIONS AND PRESIDENTIAL PARDONS

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PROEFSCHRIFT

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PREFACE

The question regarding how societies in transition should respond to systematic or widespread violations of human rights, seeking recognition for victims and promoting possibilities for peace, reconciliation and democracy in the context of transitional justice has received renewed interest. Over time, experiences in various societies undergoing major transformation have expanded and diversified the discipline, which will continue to develop, because each society has its own unique context and circumstances to which this flexible discipline can adapt by involving a combination of complementary judicial and non-judicial strategies.

Pertaining to South Africa the process of transformation, reconciliation, development and reconstruction of the South African society was not finalised when the TRC and the Amnesty Committee had reached the end of its mandates in 1998 and 2003 respectively. It is therefore imperative that all initiatives post-TRC should be approached in such a manner that it compliments and builds upon the work of the TRC, and it is therefore necessary, as this study aims to do, to encourage and contribute to the debates on the poor progress South Africa has made pertaining to successive measures in the form of post-TRC prosecutions to date, and on the implementation of controversial additional measures in the form of Presidential pardons in the aftermath of the TRC's amnesty scheme by investigating, analysing and critically evaluating the manner in which it unfolds.

The question of prosecuting *apartheid* era crimes is, according to critics, politically loaded, as some believe that they are necessary to conclude the TRC process, while others feel they could destroy reconciliation. Similarly, Presidential pardons are regarded by some as necessary to accommodate those convicted of *apartheid* era crimes, but who, for various reasons, did not participate in the TRC, and by others as inappropriate, unconstitutional and not in line with international law.

Clearly these issues are controversial, which results in diverse opinions being formed thereto. More important is the fact that future societies in transition can benefit from South Africa's achievements, shortcomings and the challenges it currently faces. How this matter is presently unfolding is therefore of particular interest to the international community, since societies' choices of measures dealing with past abuses are more likely to be effective if they are based on a serious examination of other societies' experiences as they emerged from a period of abuse. This reduces the likelihood of repeating avoidable errors – errors transitional societies can hardly afford to make.

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I am grateful to Tilburg University (UVT), the Dean of the Law Faculty and the Department of European and Public International Law for accepting me as PhD candidate as well as the generous support which enabled me to broaden my horizons. I am extremely proud of my association with UVT. Not only was I inspired to reach my full potential, I was also empowered to do so. This privilege has undoubtedly made a positive contribution to my educational and personal development.

I am indebted to the NWU and its Law Faculty which I had the benefit of using as basis. I am particularly thankful for the pleasant working environment and the excellent platform it provided, and especially for the ample opportunities and generous support offered.

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LIST OF ABBREVIATIONS

ANC	African National Congress
AWB	Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement)
AZAPO	Azanian Peoples Organisation
CARA	Criminal Assets Recovery Account
CAT	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCRC	Criminal Cases Review Commission
CONADEP	The National Commission on the Disappeared
CPA	Criminal Procedure Act
CSVR	Centre for the Study of Violence and Reconciliation
DOJ&CD	Department of Justice & Constitutional Development
DPCI	Directorate of Priority Crime Investigation
DPP	Director of Public Prosecutions
ECHR	European Commission on Human Rights
FXI	Freedom of Expression Institute
HRC	Human Rights Committee
HRMC	Human Rights Media Centre
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFP	Inkatha Freedom Party
IJR	Institute for Justice and Reconciliation
KZN	KwaZulu-Natal
MK	Umkhonto we Sizwe (Spear of the Nation)
NDPP	National Director of Public Prosecutions

NGO	Non Governmental Organisation
NIA	National Intelligence Agency
NICRO	The National Institute for Crime Prevention and the Reintegration of Offenders
NP	National Party
NPA	National Prosecuting Authority
PAC	Pan Africanist Congress
PAJA	Promotion of Administration Justice Act
PCLU	Priority Crimes Litigation Unit
PNURA	Promotion of National Unity and Reconciliation Act
SAHA	South African History Archive
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SAPS	South African Police Services
ToR	Terms of Reference
TRC	Truth and Reconciliation Commission
UN	United Nations
UNCHR	United Nations Commission on Human Rights

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CHAPTER 1
INTRODUCTION

1 Contextual background

South Africa has a long history of disregard for human rights, oppression and violent conflict, dating back to 1948 when the National Party (NP) came to power with its slogan *apartheid*,[1] and is therefore placed among countries that have been the benchmark for horrific abuses of human rights in the 20th century. The government of the day abused their majority in parliament, made a caricature of parliamentary sovereignty and totally disregarded the rule of law. As a consequence, *apartheid* laws were enacted by Parliament and many gross human rights violations were committed in the name of law and order while the real issue was the enforcement and furtherance of *apartheid*. This gave constitutional form to South Africa's racially exclusive "democracy" and the bureaucratic authoritarianism that characterised the governance of the African majority.[2] Conversely various liberation movements such as the African National Congress (ANC) and Pan Africanist Congress (PAC) resisted *apartheid* by committing heinous acts in the name of the fight for freedom.

In the late 1980s and early 1990s South Africa started a journey towards a negotiated settlement of its political crisis, and it was against the historical background of the crimes committed by both sides of the struggle in the *apartheid* era that the NP and the ANC reached an agreement on how to deal with the crimes of its past, namely conditional amnesty through a Truth and Reconciliation Commission (TRC).

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1 The *International Convention on the Suppression and Punishment of the Crime of Apartheid* 1974 13 ILM 50 criminalised *apartheid* by declaring in article I that "...*apartheid* is a crime against humanity...".

2 Berat L "South Africa: Negotiating Change?" in Roht-Arriaza N (ed) *Impunity and Human Rights in International Law and Practice* (University of Pennsylvania Press Philadelphia 1995) 267-280; Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 169 and Currie I and De Waal J *The New Constitutional & Administrative Law: Constitutional Law* vol. 1 (Juta Lansdowne 2001) 45.

Only injustices of *apartheid* that resulted in "gross human rights violations" committed with a political objective between 1960 and 1994, and that constituted crimes under South African law at the time could be investigated.[3] "Gross human rights violations" in this context was limited to crimes such as murder, culpable homicide, kidnapping and assault.[4] Many of these acts could, however, also qualify as international crimes which include war crimes, crimes against humanity, torture, inhuman or degrading treatment, but no attempt was made to bring these crimes under the ambit of the enquiry.

Prior to the first democratic elections in South Africa, the *Constitution of the Republic of South Africa*, 1993[5] had been adopted for the purpose, as set out in the preamble, of:

> ...the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.

No provision for amnesty was, however, made in the draft *Constitution*, but in the period between its approval and adoption by Parliament, the NP and ANC hammered out a postscript behind closed doors on the subject of amnesty, generally termed the "epilogue" or "postamble" to the *interim Constitution*. As mentioned, unconditional amnesty was agreed on in promoting a political settlement for the peaceful transfer to a fully democratic society by committing South Africa to a policy of reconciliation:

> ...on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament, under this Constitution, shall adopt a law determining a firm cut-off date..., and providing for the mechanisms, criteria and procedures...through which such amnesty will be dealt with...

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3 See s. 20 of the *Promotion of National Unity and Reconciliation Act* 34 of 1995 (*PNURA*) for these and other requirements.

4 S. 1(1) of the *PNURA*. See also par. 2 Ch. 4 of this book below for a more detailed discussion on the crimes in question.

5 *Constitution of the Republic of South Africa*, 1993 (*interim Constitution*).

Despite its challenges and shortcomings, the TRC has played a role in building a new democratic order through its commitment to reconciliation and national unity, but there are still unresolved matters commonly referred to as "unfinished business" that need to be attended to in the on-going process of transformation.[6]

In 1998, after the TRC had completed its work, it handed a list of names to the National Prosecuting Authority (NPA) requesting investigations to be set in motion with a view to prosecutions. The Government, however, held that it could not embark on a prosecution strategy prior to the publication of the final volumes of the TRC report and the conclusion of amnesty proceedings before the Amnesty Committee scheduled for 2003. By 2003 the Amnesty Committee reviewed 7 112 applications for amnesty of which only 849 were successful.[7]

In 2004, when the process was that far, the Priority Crimes Litigation Unit (PCLU) was established with the mandate to oversee investigations and institute prosecutions. Only a few cases were taken on, such as that of Gideon Nieuwoudt, a former police colonel who was arrested for the disappearance of the Pebco 3,[8] but the arrest sparked controversy over how post-TRC prosecutions would unfold. On the eve of further arrests, those of three former senior police officers allegedly involved in the poisoning of former South African Council of Churches Secretary General, Rev. Frank Chikane, prosecutions were suspended and it was insisted that guidelines be provided to balance the sensitivities of national reconciliation in the prosecuting process.

A report issued by the Amnesty Task Team,[9] a body tasked to consider and report on, amongst other things, a consideration of a process of amnesty on the basis of full disclosure of the offences committed during the conflicts of the past gave rise to the amendments to the National Prosecuting Policy to specifically make provision for guidelines relating to post-TRC prosecutions in annexure A thereto

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6 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 18.

7 Anon 2009 Amnesty Hearings & Decisions http://www.justice.gov.za/trc/amntrans/index.htm [date of use 15 July 2010].

8 The case related to the abduction, torture and murder of Sipho Hashe, Champion Galela and Qaqawuli Godolozi. See amnesty decision no. AC/99/0223 and TRC Report 2003 vol. 2 Ch. 3 paras. 240-244.

9 See par. 2 Ch. 3 of this book below.

(generally referred to as the policy amendments).[10] These guidelines were reviewed by Cabinet in June 2005 and came into effect in December the same year. Consequently provision was made for the prosecution of crimes committed before 11 May 1994 which emanate from conflicts of the past. The NPA then again pursued the case related to the poisoning of Rev. Chikane[11] and on 19 July 2007, in the midst of this prosecution an application was launched in the Gauteng North High Court challenging the validity of the policy amendments.[12]

Since the above-mentioned developments, no more prosecutions have taken place for *apartheid* era crimes committed with a political objective. As will become evident in this study, reasons therefore include the lack of political will to pursue post-TRC prosecutions as well as the delay and controversy surrounding the National Prosecuting Policy with regard to these prosecutions. Apart from the afore-mentioned there are also various substantial and procedural issues relating to the prosecution of these political crimes that are brought about by the fact that they were committed more than three decades ago. These issues impact profoundly on the viability or success of this phase in South Africa's transformation process. Furthermore, there are also challenges in the existing sentencing framework in the sense that the appropriateness of sentences in the context of transformation and reconciliation is doubtful.

In view of the above, the Centre for the Study of Violence and Reconciliation (CSVR), in association with other stakeholders, proposes in its "Post Truth and Reconciliation Commission (TRC) Alternative Prosecution Policy Framework for Political Violence of the Past"[13] that prosecutions for political crimes of the past should be prioritised in accordance with the following reforms and suggestions: the need for a systematic approach to prosecutions to avoid political interference; an approach that benchmarks superiors and *apartheid* State perpetrators; contingencies

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10 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 22.1. For ease of reference and to avoid confusion, the "coalition" will be used throughout the text to refer to the applicants in the *interim* court application (respondents in the appeal proceedings).

11 *S v Van der Merwe* (unreported case Gauteng North High Court 17 Aug 2007).

12 *Nkadimeng v National Director of Public Prosecutions* (32709/07) 2008 ZAGPHC 422. See par. 4 Ch. 3 of this study below.

13 Hereinafter referred to as the *CSVR's Alternative Prosecution Policy Framework*. This policy framework will be discussed in more detail in Ch. 4 par. 5.1 of this book below.

for the KwaZulu-Natal (KZN) situation; and the need to ensure victim, community and public participation in the prosecutorial process.[14]

Another controversial issue, that of Presidential pardons, loomed in the background while the post-TRC prosecutions saga unfolded. In 2002, President Mbeki granted Presidential pardons to 33 prisoners for crimes allegedly committed with a political objective.[15] The successful applicants consisted of members/supporters of the ANC and the PAC. Of the 33 applicants, 20 had applied for amnesty before the Amnesty Committee, but were denied amnesty for not disclosing the full truth or for not being able to show a political objective for their acts. The reasons for these pardons were never given, but pressure for the pardon applicants' release from prison was apparently through the ANC provincial leadership in the Eastern Cape.

Later in 2003, Mr. Chonco who was convicted of murder, allegedly also committed with a political objective, along with 383 other prisoners made applications for Presidential pardon. The applicants were assisted by the Inkatha Freedom Party (IFP) of which they were members/supporters. The IFP did not recognise the legitimacy of the TRC and consequently did not participate in its proceedings. The Minister of Justice and Constitutional Development (the Minister of Justice) received such applications and some years passed and yet no decision was made by the President.

This resulted in a sequel of court applications[16] in which Mr. Chonco and the 383 other applicants claimed that the Minister of Justice and the President have failed to process their applications for pardon with due diligence and without delay. The initial challenge and subsequent developments leading up to the Constitutional Court judgment delivered on 30 September 2009 will be dealt with below in more detail.[17]

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14 *CSVR's Alternative Prosecution Policy Framework* par. 1

15 See also par. 5.2.3 Ch. 2 of this book above.

16 *Chonco v Minister of Justice and Constitutional Development* (TPD case no 21224/2007) and *Minister of Justice and Constitutional Development v Mqabukeni Chonco* (CC case no. CCT 42/09 [2009] ZACC 25).

17 See par. 3 Ch. 5 of this book below.

The Amnesty Task Team's report, which gave rise to the amendments to the National Prosecuting Policy as mentioned earlier, also gave rise to the Special Dispensation on Presidential Pardons (Special Pardons Process).[18] This process was put in place to deal with pardon requests made by people convicted for offences they claim belong among the category of offences that were considered by the Amnesty Committee, namely offences committed with a political objective, and who were not denied amnesty by the Amnesty Committee.[19] For this purpose a Pardons Reference Group (Reference Group) was formed to consider pardon applications and submitting recommendations to the President in a manner that contributed to the ideal of reconciliation by advising the President in a spirit of even-handedness and justice on an equal basis.[20]

Immediately after the formation of the Reference Group, a coalition of non-governmental organisations[21] (the coalition) made numerous efforts[22] to engage with the President and the Reference Group to discuss their objections[23] to the Special Pardons Process which specifically concerned the rights and interests of victims.[24] The coalition also requested a list of the applicants who had submitted pardon applications. The list together with other information was, however, only disclosed after a successful application under the *Promotion of Access to Information Act* 2 of 2000.

After their efforts to constructively participate in the process were rejected, the coalition brought an urgent application before the Gauteng North High Court for an interdict preventing the President from issuing pardons. The President applied for

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18 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 22.1.

19 See par. 1 Ch. 5 of this book below. The President's address made on 21 November 2007.

20 Confirmed at its first full meeting on 6 February 2008. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 90.3.

21 CSVR, the Institute for Justice and Reconciliation (IJR), the International Center for Transitional Justice (ICTJ), the Khulumani Support Group, the South African History Archives (SAHA), the Human Rights Media Centre (HRMC) and the Freedom of Expression Institute (FXI).

22 Between 5 February 2008 and 13 March 2009 various correspondences was addressed to the chairperson of the Reference Group, its members, the South African Human Rights Commission (SAHRC) and the President.

23 See par. 2.2 Ch. 5 of this book below for a summary of the coalition's objections to the Special Pardons Process.

24 Apart from victims who suffered a direct consequences of a crime, "victims" should for ease of reference also be understood to include anyone who suffered some injury, hardship or loss such as family members. See the Oxford English Dictionary definition of "victim".

leave to appeal against the successful application and the matter was finally determined by the Constitutional Court on 20 February 2010.[25]

2 Relevance of the study

The question of how societies in transition should respond to systematic or widespread violations of human rights, seeking recognition for victims and promoting possibilities for peace, reconciliation and democracy in the context of transitional justice has received renewed interest. Over time, experiences in various societies undergoing major transformation has expanded and diversified the discipline which will continue to develop because each society has its own unique context and circumstances to which this flexible discipline can adapt by involving a combination of complementary judicial and non-judicial strategies.

Transitional justice is also of particular relevance to South Africa given its on-going process of transformation and reconciliation that started in 1994 with its first democratic election. The model of transitional justice South Africa has initially developed and utilised to address crimes committed by both sides of the struggle in its *apartheid* past, namely conditional amnesty through a TRC, will briefly be reflected upon to contextualise the post-TRC phase in South Africa. Although equally vital to the national project of transformation and reconciliation, it does, however, not enjoy as much priority and attention as the TRC itself and is also not subjected to as much national and international scrutiny.

It is imperative that all initiatives post-TRC should be approached in such a manner that it compliments and builds upon the work of the TRC, and it is therefore necessary to encourage and contribute to the debates on the poor progress South Africa has made pertaining to successive measures in the form of post-TRC prosecutions up to now, and on the implementation of controversial additional measures in the form of Presidential pardons in the aftermath of the TRC's amnesty scheme by investigating, analysing and evaluating the manner in which it unfolds.

25 See par. 4 Ch. 5 of this book below.

3 Objective of the study

The main objective of this study is to give an overview of how the post-TRC phase in South Africa has unfolded up to now with specific reference to post-TRC prosecutions and Presidential pardons. Various issues pertaining to the afore-mentioned will be investigated, analysed and evaluated. Where possible and to the extent that it is relevant to this study, the afore-mentioned issues will also be compared to that of other jurisdictions.

The research question that will be answered is whether or not prosecutions and Presidential pardons applied post-TRC in South Africa are in compliance with both national and international law.

The aim of presenting the South African model, although context specific, is to contribute to a better understanding of the challenges a society in transition face in the aftermath of initial measures in the form of amnesty. This will provide guidance to future societies in transition and reduce the likelihood of repeating avoidable errors – errors transitional societies can hardly afford to make.

Pertaining to post-TRC prosecutions, the National Prosecuting Policy, its amendment to make specific provision for post-TRC prosecutions and consequent judicial scrutiny in determining the validity thereof will be emphasised. The *CSVR's Alternative Prosecution Policy Framework* will also be investigated, analysed and evaluated. The aim hereof is to establish what a prosecution policy should and should not contain to legally and effectively regulate the decision whether or not to pursue prosecutions in this particular context. Also pertaining to prosecutions, various substantial and procedural issues relating to post-TRC prosecutions and appropriate sentencing will be identified and addressed where after possible solutions thereto will be explored.

With regard to Presidential pardons, the appropriateness and constitutionality of this additional measure to the TRC's amnesty scheme will be assessed in view of the separation of powers doctrine in a modern constitutional state, and with specific reference to the position in Argentina. Although the South African *Constitution* entrusts the President with pardoning power, the aim is to determine whether or not this prerogative, which ought to be exercised only in exceptional circumstances, should be applied post-TRC.

4 Scope and limitations of the study

Specifically pertaining to South Africa, there is a wealth of literature on transitional justice, truth commissions, prosecutions and the dichotomy between the two afore-mentioned measures in international law. The focus of this study is not on the result of South Africa's negotiated settlement, namely conditional amnesty through the TRC as initial measure to address its past, and the compatibility thereof with both national and international law as such, but a brief overview thereof will be given to contextualise this study by illustrating the tension between prosecutions and truth commissions in a post-conflict or post-authoritarian context.

Establishing whether or not a duty to prosecute rests on a successor regime will also briefly be sketched with regard to the South African context. The aim will be to determine whether or not an international duty to prosecute rested on South Africa at the time, and if so, whether or not it violated this duty by implementing an amnesty scheme through the TRC instead. The relevance thereof will then be investigated in view of the post-TRC phase, to answer the question whether or not an international duty now or still rests on South Africa to prosecute unsuccessful amnesty applicants or uncooperative perpetrators, and if so, whether or not it violates this duty by not instituting post-TRC prosecutions in cases where it is supposed and expected to prosecute, and in cases where prosecutions have been instituted and convicted offenders are then pardoned, the question is whether or not the effect of the President's pardoning power in terms of section 84(2)(j) of the *Constitution*, namely an overturn of any judicial sentence, defeats the purpose of prosecutions in that convicted perpetrators do not face the consequences of their actions, do not retain their criminal records and do not serve out their sentences. Focus will therefore be

on successive measures in the form of post-TRC prosecutions as well as additional measures in the form of Presidential pardons.

This study draws greatly on the two key court challenges pertaining to post-TRC prosecutions and Presidential pardons, namely, the *Nkadimeng*-challenge[26] and *CSVR v The President of the Republic of South Africa*.[27] During research, the legal arguments presented by the CSVR were critically analysed and it was established that it speaks of thorough preparation to the extent that not much could be added thereto in this study. Where possible and necessary, additional analysis and insight are given. The study is based on available materials as at 31 May 2010.

5 Research methodology

The research done in this study is based on a literature review and survey of both South African, foreign and international law. Relevant statutes, treaties, and other legislative measures and international instruments, common law, case law, textbooks, journal articles and internet sources have been used.

A foreign comparative legal analysis of the position in relevant jurisdictions, particularly that of Argentina, has also been done. The motivation behind the Special Pardons Process, as explained by President Mbeki in his address on 21 November 2008, shares to some extent the same sentiments of those mentioned in the preamble to the Argentinean Decree on Presidential Pardons. The Argentinean context is different to that of South Africa, but the measure, namely Presidential pardons implemented by both countries and the motivation for such, has distinct similarities. An investigation of the Argentinean approach to Presidential pardons will therefore be insightful, seeing that it has been extensively scrutinised by various international bodies. Having regard to the fact that there has not been much debate on the appropriateness and constitutionality of the application of Presidential pardons in the post-TRC phase in South Africa, the conclusions and decisions reached by the afore-mentioned international bodies will be useful. It is acknowledged that Argentina's legal history entails much more than what is covered in this Chapter. The Argentinean experience does not form the basis of this study or

26 *Nkadimeng v National Director of Public Prosecutions* (32709/07) 2008 ZAGPHC 422.
27 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09).

this Chapter, but elements thereof are relevant to the current position in South Africa and will therefore be highlighted with a view to raise concern and encourage debate.

A six-month internship at the International Criminal Tribunal for the former Yugoslavia (ICTY) was further followed as an empirical investigation to substantial and procedural issues relating to prosecution of crimes of the past. The purpose of the inclusion of references to the ICTY procedural rules and case law in this study, be it limited, is merely to highlight similarities between these and similar procedural rules and case law in South African law as ways in which certain substantial and procedural issues can be overcome. In this regard, the experience of the ICTY, as specialised tribunal dealing with crimes committed in the past, may therefore prove to be valuable to South African courts in overcoming unique challenges brought about by a substantial lapse in time between the commission of crime, its investigation and eventual prosecution and could be further considered by the relevant authorities dealing with post-TRC prosecutions.

6 Outline and overview of chapters

Chapter 2 "The dilemma of how to deal with crimes committed by the officials and agents of a predecessor repressive regime and its opposition" will briefly set out various methods that can be utilised in the context of transitional justice. A distinction will be drawn between initial, successive and additional measures. Pertaining to initial measures, the choice between prosecution and amnesty as well as considerations playing a role in making a decision, will briefly be highlighted with reference to the long history of South Africa's divided past. The afore-mentioned will serve as background to contextualise the investigation into successive and additional measures to South Africa's TRC amnesty scheme. Post-TRC prosecutions and Presidential pardons will briefly be introduced to pave the way for subsequent chapters specifically devoted to these measures.

The trend that has been set by other countries with regard to the implementation of successive and additional measures will further be established in this Chapter. Only after a proper investigation into South Africa's initiatives and progress post-TRC in subsequent chapters the possibility that the same trend will be followed in South Africa will be evaluated.

Chapters 3 and 4 will focus on post-TRC prosecutions. In Chapter 3 "A decade after the TRC in South Africa: The National Prosecuting Policy relating to post-TRC prosecutions", the National Prosecutions Policy and its amendment aimed at providing guidelines to balance the sensitivities of national reconciliation in the prosecuting process will be investigated. Part C of the policy amendments "Criteria governing the decision to prosecute" and the additional criteria it introduced will receive specific attention. The *Nkadimeng*-challenge on the validity of the policy amendments based on the above-mentioned additional criteria is significant and will form the basis of this Chapter. The legal challenges that will be investigated and evaluated include the rule of law, separation of powers, the Bill of Rights, administrative law, international law, regional human rights instruments and foreign law.

Chapter 4 "Substantial and procedural issues relating to post-TRC prosecutions and appropriate sentencing" will, with specific reference to the *CSVR's Alternative Prosecution Policy Framework*, identify the crimes in question as well as the "classes" of offenders that should be investigated and possibly prosecuted. Emphasis will then be placed on obstacles in the way of successful prosecutions with regard to constraints of the criminal justice system and more specifically, evidentiary constraints. Ways in which to alleviate the afore-mentioned will be explored and for this purpose standard arrangements in existing legislation will be relied upon. Similar provisions of the *Rules of Procedure and Evidence* of the ICTY will also be examined in order to establish whether or not South Africa can draw on the ICTY's experience in this regard. Lastly, this chapter will explore sentences that could be appropriate in the context of transformation and reconciliation with reference to judicial recognition of restorative justice and the feasibility of introducing the indigenous legal approach to punishment to make provision for customary law principles.

Chapter 5 "The Special Dispensation on Presidential Pardons" will investigate the effect of Presidential pardons on the on-going process of transformation and reconciliation in South Africa post-TRC. The origin, nature and scope of the President's pardoning power in terms of section 84(2)(j) of the *Constitution* will firstly receive attention with specific reference to the *CSVR v The President of the Republic of South Africa*, *Chonco* and *Ryan-Albutt* cases where after the application of

Presidential pardons as additional measure to the TRC's amnesty scheme will be evaluated with reference to the position in Argentina. This chapter is included in the post-TRC debate out of conviction that it is important to assess the appropriateness and constitutionality of additional efforts like Presidential pardons to a TRC process.

The last chapter will provide a synopsis of the findings and proposed recommendations made throughout the study. Based on this holistic view, South Africa's overall progress in the post-TRC phase will be evaluated and the two questions mentioned in paragraph 3 above will be answered. Finally, it will be established whether or not future societies in transition can benefit from the South African experience, whether it is by way of pursuing South Africa's achievements, by learning from its mistakes or providing in advance for shortcomings it faces.

7 Note on citations

A comprehensive list of all abbreviations or acronyms used is provided at the beginning of this book. The citation of legislative provisions and enactments follows scholarly practice in the country where the law was passed. Reported and unreported decisions of courts, tribunals, commissions or other forums are also cited according to the relevant domestic practice. Reference to sources in footnotes will be done in full and a comprehensive bibliography of all works and authorities cited is provided at the back of this book.

This book follows the style of footing and referencing of the *Potchefstroom Electronic Law Journal*.[28] Attempt has been made to adopt a consistent style of citation, footing and referencing according to the house style and rules of the same journal, with few amendments.

28 Published by the North-West University, Potchefstroom Campus, South Africa.

CHAPTER 2

THE DILEMMA OF HOW TO DEAL WITH CRIMES COMMITTED BY THE OFFICIALS AND AGENTS OF A PREDECESSOR REPRESSIVE REGIME AND ITS OPPOSITION

1 Introduction

How crimes committed by the officials and agents of a predecessor repressive regime and its opposition should be dealt with, is a principal preoccupation of international law and not unique to South Africa.[29] In most cases international law features prominently as many of the crimes committed are crimes under both international law and national law. Occasionally, the acts in question are crimes under international law alone given that national law authorised conduct in violation of accepted civilised norms.[30] Since 1945, the range of responses to these types of crimes has evolved resulting in a variety of methods employed by various countries.[31]

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29 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1001.

30 Dugard J "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" 1997 *SAJHR* 258.

31 Prosecution before international tribunals for crimes under international law was the course chosen for the leaders of the defeated Nazi and Japanese regimes; later after the re-establishment of the German judicial system, Nazi's were tried before German courts; in 1974 the overthrown Greek colonels were prosecuted before Greek courts; since 1974, nearly fifty truth commissions or similar fact finding bodies worldwide have been established; during the late 1990s prosecutions before domestic courts were conducted in Ethiopia and Rwanda; various international criminal tribunals have been established to try those responsible for international crimes in the former Yugoslavia (ICTY), Rwanda (ICTR), Lebanon; and a permanent International Criminal Court (ICC) has been established in 2002. More recently, the Supreme Iraqi Criminal Tribunal (formerly Iraqi Special Tribunal) was established under Iraqi national law to try Iraqi nationals or residents accused of genocide, crimes against humanity, war crimes or other serious crimes committed between 1968 and 2003. This body organised the trial of Saddam Hussein and other members of his Ba'ath Party regime. See Dugard J "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" 1997 *SAJHR* 258; Anon 2009 Latest from USIP on Transitional Justice http://www.usip.org/issue-areas/transitional-justice [date of use 18 March 2009]; Hayner P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" 1994 *Human Rights Quarterly* (vol. 16) 600; Yav Katshung J 2008 Truth Commissions and Prosecutions: Two sides of the same coin? http://www.restorativejustice.org/ 10fulltext/yav-katshung-joseph.-2008.-truth-commissions-and-prosecutions-2028two-sides-of-the-same-coin/view [date of use 18 March 2009] and Stan L 2008 Truth Commissions http://www.scitopics.com/Truth_Commissions.html [date of use 18 March 2009].

Delivering justice in a post-conflict or post-authoritarian period is complicated by various factors such as the scale of atrocities, an often compromised judicial system, limited resources and lack of political will to prosecute perpetrators.[32]

The need for alternative and complimentary mechanisms which together can effect justice, establish a culture of human rights and rule of law, as well as move a country away from the divisions of its past and contribute to reconciliation has given rise to its own interdisciplinary field, namely "transitional justice". At the outset, this discipline will briefly be placed in context where after the basic approaches thereto, which include criminal prosecutions and truth commissions, will be explored. Prosecutions are generally perceived as a mode of retributive justice focussed on the perpetrator with the end goal being punishment, whereas truth commissions are characterised as institutions of restorative justice with a primary focus on the victim and restoring the dignity of the individual in the broader society.[33] In this regard, reference will be made to restorative justice as the underlying philosophy of the South African TRC and as an important feature of transitional justice.[34]

The way in which prosecutions and truth commissions can be implemented, either simultaneously or individually, will also be investigated with the aim of drawing a clear distinction between initial, successive and additional measures. Specifically pertaining to South Africa, there is a wealth of literature on transitional justice, truth commissions, prosecutions and the dichotomy between these measures. A brief overview thereof will be given merely to illustrate the tension between prosecutions and truth commissions in a post-conflict or post-authoritarian context. As mentioned above,[35] focus will not be on the result of South Africa's negotiated settlement, namely conditional amnesty through the TRC as initial measure to address its past, but on successive measures in the form of post-TRC prosecutions aimed at unsuccessful amnesty applicants and uncooperative perpetrators as well as additional measures in the form of Presidential pardons aimed at those cases that

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32 Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence 1 http://www.humansecuritygateway.com/documents/CSVR_TrialsTruth Commissions SeekingAccountability_AftermathViolence.pdf [date of use 2 May 2010).

33 Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence 1 http://www.humansecuritygateway.com/documents/CSVR_TrialsTruth Commissions SeekingAccountability_AftermathViolence.pdf [date of use 2 May 2010).

34 See Ch. 4 of this book below.

35 See par. 4 Ch. 1 of this book above.

fell outside the scope of the TRC as well as those that fell inside the scope but not brought before the TRC for political reasons.

The international position on prosecutions versus truth commissions in establishing whether or not a duty to prosecute rests on a successor regime will briefly be sketched from a South African perspective. The aim will be to determine whether or not an international duty to prosecute rested on South Africa at the time, and if so, whether or not it violated this duty by implementing the TRC instead. The relevance thereof will then be investigated in view of the post-TRC phase, to answer the question whether or not an international duty now or still rests on South Africa to prosecute unsuccessful amnesty applicants or uncooperative perpetrators, and if so, whether or not it violates this duty by not instituting post-TRC prosecutions in cases where it is supposed and expected to prosecute.

With brief reference to various countries that also employed truth commissions, the establishment of the South African TRC as well as the challenge on its constitutionality and consistency with international law in *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) will be highlighted. Finally, also with brief reference to various countries, the successive and additional measures South Africa is employing after the TRC amnesty scheme, with specific reference to prosecutions, will come under the spotlight paving the way for a more detailed analysis thereof in Chapters 3 to 5.

2 Transitional justice: Dealing with crimes of the past[36]

"The justice that is appropriate to societies undergoing transition", "justice during transition" or "transitional justice" as it is commonly referred to, is understood as a response to systematic or widespread violations of human rights seeking recognition for victims and promoting possibilities for peace, reconciliation and democracy.

Transitional justice is further not held to be a special form of justice, but justice adapted to societies undergoing major transformation, such as regime changes from authoritarian or repressive rule to democracy or electoral rule or a transition from conflict to peace or stability.

The concept of transitional justice is commonly understood as a framework for confronting past abuse as a component of a major political transformation. This generally involves a combination of complementary judicial and non-judicial strategies. Although transitional justice draws on international law as source that require prosecution under specific circumstances, "justice" in this context also includes broader forms of justice such as truth-seeking mechanisms.[37] The afore-

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36 The synopsis on transitional justice is based on the following: Anon 2009 What is Transitional Justice? www.ictj.org/en/tj [date of use 2 May 2009]; Shelton D (ed) *The Encyclopaedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA 2004) vol. 3 1045-1047; Bassiouni MC (ed) *Post Conflict Justice* (Transnational Publishers Ardsly New York 2002); Boraine A, Levy J and Scheffer R (eds) *Dealing with the Past:* Truth and Reconciliation in South Africa (Institute for Democracy in South Africa Cape Town 2003); Crocker DA "Reckoning with Past Wrongs: A Normative Framework" in Rosenthal JH and Barry C (eds) *Ethics and International Affairs: A Study* 3rd ed (Georgetown University Press Washington D.C. 1999) 43-61; Hayner P *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge New York 2002); Kritz N *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* vol. I-III (U.S. Institute of Peace Press Washington DC 1995); Méndez JE "Accountability for Past Abuses" 1997 *Human Rights Quarterly* 255; Nino CS "Radical Evil on Trial" (Yale University Press New Haven Connecticut 1996); Zalaquett J "Introduction to the English Edition" in Center for Civil and Human Rights of Notre Dame Law School Berryman PE (trans) *Chilean National Commission on Truth and Reconciliation: Report on the Chilean National Commission on Truth and Reconciliation* English Translation (University of Notre Dame Press South Bend, Indiana 1993); Allen J "Between Retribution and Restoration: Justice and the TRC" 2001 *South African Journal of Philosophy* 34. See Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 194-195 and Cassese A *International Criminal Law* 2nd ed (Oxford University Press New York 2005) 10.

37 The following complementary approaches in an effort to contribute to comprehensive justice have been suggested: Reparations programs, gender justice, security system reform and memorialisation efforts.

mentioned has led to critics arguing that transitional justice overlooks the connection between a truth commission's work and legal justice.[38]

On the question whether truth commissions alone are enough, Van Zyl[39] suggests that transitional justice should be embraced in as holistic a way as possible and that as many of the following five approaches as is possible in the circumstances should be followed: criminal prosecutions; truth commissions; reparations to victims; reform of state institutions; and the promotion of meaningful reconciliation. Similarly, Du Toit[40] is of the opinion that Truth Commissions always have to be part of a bigger transitional process. He holds that in transition, there is a need to achieve various goals such as the reinstatement of the rule of law, so that everyone, including the government is subject to the rule of law. One of the most viable ways to do that is, according to him, by means of prosecutions to hold the perpetrators accountable.

The origins of the concept can be traced back to the post-World War II setting in Europe, but it gained coherence beginning with the trials of the military *juntas* in Greece (1975), Argentina (1983) and mainly in response to political changes in Latin America and Eastern Europe and to demands for justice in these regions. At the time, human rights activists and others wanted to address the abuses by former regimes without endangering the political transformations that were under way.

As the field has expanded and diversified, it has gained an important foundation in international law. Part of the legal basis for transitional justice is the 1988 decision in the Inter-American Court of Human Rights in the case of *Velásques Rodríguez v. Honduras*,[41] in which the court found that all states have the following four fundamental obligations in the area of human rights:

a) To take reasonable steps to prevent human rights violations;

b) To conduct a serious investigation of violations when they occur;

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38 Allen J "Between Retribution and Restoration: Justice and the TRC" 2001 *South African Journal of Philosophy* 34. See Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 194-195.

39 *Justice for a Lawless World? Rights and reconciliation in a new era of international law* Part II 30-33.

40 *Justice for a Lawless World? Rights and reconciliation in a new era of international law* Part II 16-18.

41 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (29 Jul 1988).

c) To impose suitable sanctions on those responsible for the violations; and

d) To ensure reparation for the victims of the violations.

The above have been explicitly affirmed by later decisions by the court and endorsed in decisions by the European Court of Human Rights and by the United Nations (UN) treaty body decisions such as the Human Rights Committee. The 1998 creation of the ICC was also significant, as the *Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9)*[42] regards state obligations to be of vital importance to the fight against impunity and respect for victims' rights.

The UN Secretary-General, in his 2004 report on transitional justice, declared that the concept:[43]

> ...comprise(s) the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.

In the following paragraphs prosecutions and truth commissions will be explored with a view of establishing whether or not, despite the tension between the two measures, they can effectively operate together in pursuing a synergistic or complimentary relationship when designing comprehensive responses to the need for post-conflict or post-authoritarian justice. Alternatively, and in cases where the two measures cannot operate in tandem, prosecutions will be explored as successive measures complementing truth commissions.

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42 *Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9) (Rome Statute).*

43 *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* Report of the Secretary-General to the Security Council 3 August 2004 UN Doc. S/2004/616.

2.1 Initial measures

2.1.1 Prosecutions

Prosecutions in post-conflict or post-authoritarian context are usually aimed at investigating and ultimately trying suspects considered most responsible for massive or systematic crimes. They can be brought before the ICC, *ad hoc* international criminal tribunals, hybrid criminal tribunals or national courts.

Specifically pertaining to South Africa, these options excluded prosecution before the ICC since it was not yet established at the time. The ICC was established by the adoption of the *Rome Statute*, which also defines the jurisdiction of the ICC. Aside from only having jurisdiction over the most serious crimes of concern to the international community, the temporal jurisdiction of the ICC is limited to crimes occurring after the entry into force of the *Rome Statute*, namely 01 July 2002. For those states that become party to the statute after this date, the ICC has jurisdiction over crimes committed after the entry into force with respect to that state.[44] South Africa incorporated the *Rome Statute* into its national law by means of *The Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002[45] to give effect to its obligations under the *Rome Statute*.

Options included Nuremberg-type trials, which were excluded as the international community was in no mood to set up an international tribunal for *apartheid* era crimes. Prosecution before national courts was likewise impossible, as there were no victors in the process that brought an end to *apartheid*, and the leaders of *apartheid* were themselves a party to the negotiated settlement.

2.1.2 Truth commissions

On many occasions, depending on special historical, political or social circumstances, it may prove appropriate and in some cases vital, to respond to the widespread perpetration of international crimes by establishing truth commissions instead of instituting prosecutions. This may be the case, in particular, when legal or constitutional limitations on accountability, such as amnesties through truth commissions, result from negotiations such as the case with South Africa. This may

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44 Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 192.
45 *Rome Statute of the International Criminal Court Act* 27 of 2002.

also be due to new regimes lacking the power to embark on prosecution as in the case of Chile, or that a judicial system is weak, corrupt or ineffective, or when there is a large number of perpetrators that is far beyond the capacity of a judicial system, limitations of evidence, competing priorities and the lack of political will to prosecute perpetrators or when the former government is still strong and any major trial of all the persons who orchestrated or ordered atrocities would be likely to jeopardise the stability and viability of the new democratic government and posing a potential threat to peace processes.[46]

Truth commissions vary considerably in respect of its composition, independence, mandate and powers.[47] This is due to the fact that truth commissions are adapted to meet the specific needs of their local context which result in a variation of their overall design and focus to such an extent that no two bodies have been the same. Despite the differences, they are generally considered to have the following four attributes:[48]

a) They generally have some form of authority emanating from either an international or national mandate;

b) They exist for a limited period of time;

c) They focus on past events; and

d) They attempt to discern the overall picture of a conflict as opposed to a given event.

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46 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1005 and Shelton D (ed) *The Encyclopaedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA 2004) vol. 3 1045-1047.

47 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1005. Cassese A *International Criminal Law* 2nd ed (Oxford University Press New York 2005) 10 also notes that not all truth commissions are endowed with the same powers, the South African TRC was unique in this sense in that it had quasi-judicial powers which include the power to grant amnesty. Berat L and Shain Y "Retribution or truth-telling in South Africa? The legacy of the transitional phase" 1995 *Law and Social Inquiry* 186 in Bassiouni MC *Introduction to International Criminal Law* (Transnational Publishers 2003) 712 further noted that an international or national truth commission is not necessarily a reconciliation commission, as some of these commissions can have criminal investigative features. See also Stan L 2008 Truth Commissions http://www.scitopics.com/Truth_Commissions.html [date of use 18 March 2009]. A consequence of the variations is that names of the different truth commissions vary, but for ease of reference the term "truth commissions" will be used.

48 Bassiouni MC *Introduction to International Criminal Law* (Transnational Publishers 2003) 711.

In addition to the above, the scope of truth commissions is often limited to "gross violations of human rights" committed with a "political objective" in the course of conflicts during a significant period of time in a particular country's past.

Truth commissions have different aims – two that have been identified are to make recommendations to remedy human rights abuses and to prevent its recurrence.[49] The advantages and disadvantages of truth commissions and what truth commissions can or cannot achieve have been extensively debated in literature over time, but in a nutshell it has been pointed out that when truth commissions are established for the right reasons and with the necessary political will, it is able to facilitate acknowledgement for victims, establish accountability for perpetrators, shed light on the role of beneficiaries and bystanders, morally sanction the violation of human rights, write an inclusive history of a nation, counter denial, as well as provide a blueprint for a new democratic state through its findings and recommendations.[50]

The UN has either advocated or supported truth commissions in a number of recent peace processes and the UN Secretary-General's 2004 report on transitional justice describes truth commissions as:[51]

> [a] potentially valuable complementary tool in the quest for justice and reconciliation, taking as they do a victim-centred approach and helping to establish a historical record and recommend remedial action.

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49 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1005 and Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 192.

50 Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence 4 http://www.humansecuritygateway.com/documents/CSVR_TrialsTruth Commissions SeekingAccountability_AftermathViolence.pdf [date of use 02 May 2010].

51 *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General to the Security Council, 3 August 2004, UN Doc. S/2004/616.

As mentioned earlier, restorative justice is regarded as an important feature of transitional justice.[52] The South African TRC therefore chose restorative justice as its underlying philosophy and point of departure.[53] In her study on Transitional Amnesty in South Africa, Du-Bois Pedain asks the following question:[54]

> Does the amnesty process fare better when it is analysed from a restorative justice perspective?

According to Du-Bois Pedain, "justice" for the restorative justice theorist requires the "restoration" of the disturbed relationship between victims, offenders and the wider community: a restoration achieved through an open, dialogical process, in which perpetrators admit their wrongdoing and take active responsibility for setting things right.[55] Restorative justice in this specific context is therefore aimed at the victims, perpetrators and communities in a situation of political transition from undemocratic rule to the first phases of democracy and the affirmation of human rights.[56]

Restorative justice should, according to Villa-Vicencio, include the following concerns which in essence come down to acknowledgement, reparation and reconciliation:[57]

a) An organised system of justice based on international standards of human rights;

b) The administration of justice should benefit all;

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52 Villa-Vicencio C "Transitional Justice, Restoration and Prosecution" in Sullivan D and Tifft L (eds) *Handbook on Restorative Justice: A Global Perspective* (Routledge London and New York 2006) 387.

53 Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 192.

54 Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence http://www.humansecuritygateway.com/documents/CSVR_TrialsTruth_CommissionsSeekingAccountability_AftermathViolence.pdf [date of use 02 May 2010)281.

55 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 281.

56 See Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 192.

57 See Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 192.

c) The promotion of moral values and shared commitment to create a society based on the rule of law;

d) To hold violators of gross human rights violations liable;

e) Collective criminal guilt – the sharing of political responsibility for the past;

f) To acknowledge the importance of memory;

g) Punish where necessary; and

h) To rehabilitate victims.

Theories of restorative justice also emphasise the goal of harmony and community restoration to the neglect of other aspects of criminal justice.[58] With reference to community restoration, Du-Bois Pedain also highlighted the notion of "community justice". The claim is said to be that some (particularly indigenous) communities have their own, culturally specific "justice scripts" and that the criminal justice process implemented by the modern nation-state is experienced in these communities as an inadequate, and socially harmful, response to crime.[59] This is also said to be combined with a claim that these traditional justice mechanisms are more directly educational and re-integrative than the more formal and "de-personalised" criminal justice script of the standard criminal trial, and therefore morally preferable to the modern nation-state's way of "doing justice".[60]

The point, as Du-Bois Pedain sees it, is simply that "doing justice" in some cultures involves mostly rituals that restore relationships between victims, offenders and other members of the community, sometimes through "re-integrative shaming", sometimes through symbolic or restitutive practices of "making amends". According to Du Plessis, justice was therefore not realised through the TRC, as concepts of justice are fallible.[61] Some victims felt that apart from participating in the process,

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58 Allen J "Between Retribution and Restoration: Justice and the TRC" 2001 *South African Journal of Philosophy* 34. See Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 193.

59 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 282.

60 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 282.

61 Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 193.

perpetrators also had to be punished. Punishment may include for example other forms of restitution, community service and monetary compensation. Du-Bois Pedain also points out that the above is not without limitations, for a particular practice such as torture can be so morally offensive that the imposition of the modern nation-state's "justice script" will be preferred.

Both understandings of restorative justice, namely as an ethically superior, "true" form of justice, and as a culturally adequate form of conflict resolution have been particularly relied upon by the TRC Chairperson, Emeritus Archbishop Desmond Tutu, to defend South Africa's amnesty scheme.[62] Du-Bois Pedain, on the other hand, is not convinced that the TRC's amnesty scheme was in conformity with the normative ideal of restorative justice, and/or with indigenous practice.

More important is that in divided societies the core element of restorative justice is a minimalist consensus on the denunciation of political cruelty and injustice.[63] This implies that failed applicants for amnesty and those that did not apply for amnesty should be prosecuted by the criminal justice system.[64]

2.1.3 Prosecutions and truth commissions pursued simultaneously

The many problems that flow from past abuses are often too complex to be solved by one action and experience suggests that to be effective, transitional justice should include several measures that complement one another, for no single measure is as effective on its own as when combined with the others. It has been suggested that it is better perhaps that truth commissions serve as a precursor to or possibly operate in tandem with prosecutions.[65] From this it follows that one measure could be implemented to address those issues not addressed or resolved

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62 Tutu D *No Future Without Forgiveness* (Doubleday 1999) 51. See Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 283.

63 Allen J "Between Retribution and Restoration: Justice and the TRC" 2001 *South African Journal of Philosophy* 34. See Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 193.

64 Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 193 and Transitional Justice: Paving the Way to Peace 31 in *Justice for a Lawless World? Rights and reconciliation in a new era of international law* Part II 16-18 http://www.irinnews.org/IndepthMain.aspx?InDepthID=7&ReportID=59464 [date of use 29 June 2010].

65 Bassiouni MC *Introduction to International Criminal Law* (Transnational Publishers 2003) 711.

by the other measure. The question is whether more than one measure should be pursued simultaneously or individually, and what the limits thereto ought to be to avoid tension and counter productivity.

Increasingly, countries attempting to come to terms with their past are employing a variety of responses over the long term. In the past, these varying responses were generally pursued in isolation from one another separated in time. This was said to be due to the general assumption that the pursuit of retribution (characterised by prosecutions) or reconciliation (characterised by truth commissions or other non-judicial accountability mechanisms) were mutually exclusive or even at odds.

It is pointed out that today there are growing examples of both objectives being pursued simultaneously through distinct mechanisms.[66] In his 1997 report, Louis Joinet recommended that an extrajudicial commission of enquiry into past events should go hand in hand with prosecution and punishment of human rights violators.[67]

This trend is held to allow for complementarities[68] and support for this view is to be found in the UN Secretary-General's 2004 report:

> It is now generally recognized, for example, that truth commissions can positively complement criminal trials, as the examples of Argentina, Peru, Timor-Leste and Sierra Leone suggest.

Equally, however, it has been acknowledged that having two measures to deal with past crimes simultaneously, both with different mandates and objectives, can create tension and complications. The answer, it is suggested, lies in the "harmonisation of objectives", defined as meaning "that a post-conflict body pursuing justice and another body pursuing truth and reconciliation cannot operate in a

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66 Sierra Leone, East Timor and Burundi.

67 Report on the "Question of the Impunity of Perpetrators of Human Rights Violators" to the Sub-Commission on Prevention of Discrimination and Protection of Minorities UN Doc. E/CN, 4/sub.2/1997/20/Rev I (1997). See Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1005.

68 Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence 11 http://www.humansecuritygateway.com/documents/CSVR_TrialsTruthCommissions_SeekingAccountability_AftermathViolence.pdf [date of use 02 May 2010).

manner that is oblivious of the other"[69] and that the two measures should pursue their differing objectives in a symbiotic way.

Apart from the likely conflict between the two measures and confusion in the minds of the public, it is doubtful whether prosecutions will be a viable option in tandem with truth commissions having regard to the fact that prosecutions are rarely an option for countries in transition as mentioned above. Under these circumstances, Dugard's submission that in practice prosecutions and truth commissions are competing measures for dealing with crimes of the past, seems correct.

2.2 Successive and additional measures

In cases where, as mentioned above, prosecution is not an immediate and viable option for a specific country in transition (not alone or in tandem with a truth commission), and a truth commission alone is implemented instead, the question remains whether or not successive and additional measures can or should be implemented after the completion of the truth commission's mandate to complement its work and further its objectives of transformation and reconciliation. Again, successive measures refer to prosecutions and additional measures to Presidential pardons.

The focus of this study will be on cases where amnesty, through truth commissions or similar bodies, was chosen as an initial measure to address crimes committed by a former regime and its opposition. The reality of truth commissions in this regard is that apart from failed applications for amnesty, there are also those who simply choose not to participate in the proceedings as well as those who could not participate due to limitations on the scope of the relevant truth commission. Furthermore, there are those who continue to commit crimes even after an amnesty scheme and subsequent transition. From this it follows that in cases where a truth commission is chosen as the initial measure to address a country's past, it cannot be regarded as comprehensive and final.

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69 Varney H "Retribution and Reconciliation: War Crimes Tribunals and Truth Commissions – Can They Work Together?" in International Bar Association Human Rights Institute (ed) *Our Freedoms: A Decade's Reflection on the Advancement of Human Rights* (Human Rights Institute of the International Bar Association London 2007).

Although transitional justice literature does not make a clear distinction between initial, successive and additional measures, it acknowledges, as mentioned above, that several measures complementing one another is necessary to bring about a successful transition. What has also crystallised, as will become evident throughout this study is that prosecutions are regarded as the only credible alternative to amnesty and that further amnesties, also generally referred to as a "second bite at the amnesty cherry" or "re-run" of a truth commission under the guise of additional measures such as further amnesties and Presidential pardons, should not be permitted.

3 The international position on prosecutions and truth commissions: A South African perspective

It has correctly been pointed out that in view of the South African context, academic research has focussed to a large extent on the question of whether or not the TRC amnesty scheme was compatible with international law.[70] Intrinsic hereto are the following: Was South Africa under an international obligation to prosecute *apartheid* era crimes? Do duties to prosecute rule out amnesties? Should all amnesties be recognised? This clearly relates to the initial measures South Africa considered at the time pertaining to the dilemma of how to deal with crimes committed by the officials and agents of a predecessor repressive regime and its opposition, specifically the choice between prosecutions and a truth commission.

The negotiated settlement South Africa reached in solving its political crisis, namely amnesty through a TRC, has caused quite a stir, both nationally and internationally, which led to a vast amount of literature being generated. A brief summary of findings from the literature will be used to shed light on its relevance for the debate on successive and additional measures thereto in the aftermath of the TRC's amnesty scheme.

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70 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 179.

3.1 Initial measures: International law duties to prosecute versus the TRC's amnesty scheme

Some are of the opinion that prosecutions and amnesty are competing mechanisms while others argue that it is not necessarily mutually exclusive although frequently presented as such.[71] Furthermore, it has been noted that there is no clear consensus that the pursuit of prosecutions is always in the interest of comprehensive justice (of which peace is a central component), nor is the exclusion of amnesty for even the most heinous of crimes consistently enforced.[72] Finding the middle ground in this debate, it is held that truth commissions can occupy a space between blanket amnesty and broad-scale criminal prosecutions, and have a relationship with either or both depending on their mandate and objectives.[73]

With the aim of evaluating the above-mentioned viewpoints on prosecutions versus amnesty, the following section will provide a brief overview of the possible sources of duties to prosecute under international law and will assess their impact on the legality of national amnesty laws.

In general it is convincingly argued that both treaties and customary international law oblige a successor regime to punish members of a previous regime for acts that constitute crimes under international law.[74] Whether or not this is the case in the South African context, however, remains to a certain extent unsettled.

At the outset it is necessary to determine the scope of the South African context. Apart from the internal conflict between the South African security forces and national liberation movements, the South African security forces were also involved in major operations in Angola and Northern Namibia; in counter-insurgency operations in pre-independence Zimbabwe; in cross-border raids into Lesotho, Botswana, Swaziland, Mozambique, Zimbabwe and Zambia; and in covert operations in the Seychelles and Comores. It has been noted that more people were

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71 Goldstone RJ and Fritz N "In the Interests of Justice and Independent Referral: The ICC Prosecutor's Unprecedented Powers" 2000 *LJIL* 655 and Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1005.

72 Mallinder L "Can Amnesties and International Justice be Reconciled?" *International Journal of Transitional Justice* 1(2) (2007) 208-230.

73 Mallinder L "Can Amnesties and International Justice be Reconciled?" *International Journal of Transitional Justice* 1(2) (2007) 208-230.

74 Dugard J "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" 1997 *SAJHR* 262.

killed by the South African security forces in the maintenance of the *apartheid* state outside South Africa than within.[75]

This investigation will, however, only focus on the internal conflict between the South African security forces and national liberation movements because although the Amnesty Committee could hear evidence on acts committed *outside* the borders of South Africa for purposes of establishing as complete a picture as possible, it could in principle, however, not grant amnesty for these acts as contemplated by section 20(7) to (10).

The *PNURA* made provision for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the relevant period under scrutiny by the TRC, *within* or *outside* the borders of South Africa emanating from conflicts of the past. Furthermore, from section 20(7) to (10) it is clear that the intention of the legislature was to expunge all civil and criminal liability as well as all entries on records of official documents pertaining to such offences and that the offence or delict in respect of which amnesty is granted shall be deemed not to have taken place.

In respect of acts committed *outside* the borders of South Africa the Amnesty Committee, noted that it:[76]

> ...had to decide whether it has jurisdiction to hear an application for amnesty for offences committed in the United Kingdom. It is clear that this committee, acting in terms of an Act passed by the South African Parliament, which can only make laws enforceable and effective within the Republic of South Africa, cannot make decisions binding on courts or bodies functioning outside the borders of South Africa...
>
> ...
>
> ...It is, however, the view of the Committee that any decisions arrived at by the Commission will only be effective within the borders of the Republic of South Africa.

In answering this question, the Amnesty Committee referred to *Stopforth & Veenendal v Minister of Justice* 2000 1 SA 113 (SCA) where the Supreme Court of Appeal confirmed the decision of the Court *a quo* that the Amnesty Committee could

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75 Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 543. See also Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 182.

76 Johannes P Coetzee, Craig M. Williamson, Eugene A de Kock and others in application no. AC/99/0292.

not grant amnesty for deeds committed in Namibia, because it did not have jurisdiction as those crimes could not be tried in South African courts.[77]

Despite the above, the Amnesty Committee granted amnesty in respect of the acts, omissions and offences flowing from, and directly related to the malicious damage of the ANC offices in London and the conspiracy to damage the offices of the South African Communist Party in London. The task of establishing as complete a picture as possible of the conflict of the South African past which springs from its deeply divided society, weighed more heavily with the Amnesty Committee as opposed to the question as to whether or not a trial court would be bound by its decisions, a question also left open by the Supreme Court of Appeal.

With reference to the most pertinent international law instruments, the following paragraphs will provide a brief overview of the different opinions on its applicability to the internal conflicts South Africa was confronted with during the *apartheid* era.[78] The application of some of these and other international, regional and foreign law instruments in recent South African case law on the matter is further investigated below.[79]

3.1.1 The law of treaties

Pertaining to international humanitarian law, the 1949 *Geneva Conventions on the Laws and Customs of War* (*Geneva Conventions*)[80] and the two additional 1977 protocols thereto[81] impose obligations to prosecute for "grave breaches" of its provisions and accords protection to certain categories of people by laying down minimum standards of treatment. South Africa acceded to the *Geneva Conventions*

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77 *Stopforth and Veenendal v Minister of Justice* 2000 1 SA 113 (SCA) par. 35.

78 For a comprehensive analysis of these and other international instruments, compare Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 174- 192; 308-341 and 526-546, Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 300-319. See Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 179-196.

79 See paras. 4.5.4-4.5.6 Ch. 3 of this book.

80 Article 49 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (*Geneva Convention I*); a. 50 of the *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (*Geneva Convention II*); a. 129 of the *Geneva Convention relative to the Treatment of Prisoners of War* (*Geneva Convention III*); a 146 of the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (*Geneva Convention IV*).

81 *Protocol Additional to the Geneva Conventions* of 12 August 1949, and relating to the *Protection of Victims of International Armed Conflicts* (*Protocol I*), 08 June 1997 and *Protocol Additional to the Geneva Conventions* of 12 August 1949, and relating to the *Protection of Victims of Non-International Armed Conflicts* (*Protocol II*), 08 June 1997.

in 1952 and to the two *Additional Protocols* in 1995. The question is whether or not the above instruments were applicable to the conflicts South Africa was confronted with at the time.

With reference to the dates of accession to the above instruments, article 28 of the 1969 *Vienna Convention on the Law of Treaties* determines that a convention is only applicable to situations which occurred after the entry into force of the particular convention for the signatory state in question. Based on the above it is clear that the *Geneva Conventions* can be considered. However, the situation with regard to the two *Additional Protocols* is different. Before it can be considered, it should be established whether or not the two *Additional Protocols* have become part of customary international law which was already applicable during the period in question.

Common article 2 of the *Geneva Conventions* set out thresholds which restrict its applicability to *international armed* conflicts. *Additional Protocol I* aims to supplement common article 2 by extending its application to:

> ...armed conflicts in which peoples are fighting against...racist regimes in their exercise of self-determination...

Common article 3 of the *Geneva Conventions* provides protection to certain categories of people by laying down minimum standards, which must be fulfilled in "non-international armed" conflicts. *Additional Protocol II* develops and supplements common article 3 and seeks to extend the protection it accords to armed conflicts (not covered by *Additional Protocol* I) which:

> ...take(s) place in the territory of one of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Expressly excluded from its scope is:

> ...situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

With reference to the *Geneva Conventions* it has been argued that the internal low intensity of conflicts which South Africa have been confronted with at the time, in particular those between the security forces and the national liberation movements were neither "international" nor "armed" and therefore failed to meet the threshold set by common article 2.[82]

Although attempts have been made to extend the application of the *Geneva Conventions* by supplementing it with *Additional Protocols I and II*, doubt has been cast on its applicability in the South African context: Firstly, because both the *Additional Protocols* still require an "armed conflict" which, as pointed out above, was not met. Secondly, because it is not clear whether *Additional Protocol I* codified customary international law which was already applicable during the period in question.[83] Finally, because the requirements of *Additional Protocol* II, which to a large extent codifies customary international law concerning non-international armed conflicts, could not be met by the expansion of militant opposition activities, which were far from being able to exercise sustained military operations.[84] A further treaty imposing an obligation to prosecute in general is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 23 ILM 1027* (*Torture Convention*)[85] to which South Africa acceded in 1998. This treaty is aimed at perpetrators of gross human rights violations and with reference to the definition of

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82 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC) par. 29. See also Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 544.

83 With regard to the settled practice (*usus*) requirement in establishing whether or not *Additional Protocol I* have become part of customary international law, the court in *S v Petane* 1988 3 SA 51 (C) followed a similar approach to that the International Court of Justice followed in the *Asylum* case 1950 ICJ Reports 266 namely that the relevant practice must be "constant and uniform". The court had to decide whether or not a member of the military wing of the ANC was entitled to prisoner-of-war status on the ground that *Additional Protocol I of 1977* to the *Geneva Conventions of 1949*, which grants such status to members of national liberation movements, had become part of customary international law and was thus binding upon SA (which up to then had treated such persons as common criminals and only became a party to the *Protocol* in 1995). The court found that the mere fact that some 60 states had signed the *Protocol* could not be seen as evidence of *usus* and that a customary law rule had therefore not been formed. See also Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 323. See further Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 186.

84 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 323. See also Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 186.

85 Articles 4-7 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 23 ILM 1027.*

torture,[86] the TRC found that the South African police systematically used torture against the members of liberation movements to force them to cooperate or disclose information.[87] Again, with reference to the date of accession, this convention is not applicable[88] and hence no duty to prosecute arises from this convention. Whether or not the content of the *Torture Convention* has become part of customary international law applicable during the period in question, will be addressed below.[89]

As mentioned above, this study does not concern *apartheid* as international crime in terms of the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*.[90] This is due to the legality of *apartheid* in South Africa at the time and moreover because South Africa never became party to this convention. Due to the limited international support of this convention and despite the incorporation thereof in article 7(1)(j) of the *Rome Statute*, it is furthermore doubtful whether an obligation under customary international law has developed obliging South Africa to prosecute on the strength thereof.

3.1.2 Customary international law

Specific acts or classes of crimes associated with egregious abuses of human rights such as those committed by the state security forces during the conflict in South Africa make up crimes against humanity.[91] Prior to the adoption of the *Rome Statute* which gives crimes against humanity a comprehensive treaty-based definition, only a few international treaties regulate aspects of this crime.[92] The *Rome Statute* further sets various thresholds that elevate specific acts or classes of crimes to the level of crimes against humanity: Firstly, that the act in question must be part of a widespread and systematic attack; secondly, that the act must be

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86 Article 1(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 23 ILM 1027.*
87 TRC Report 2003 vol. 6 s. 5 Ch. 2 par. 16.
88 Article 28 of the 1969 *Vienna Convention on the Law of Treaties* and article 27(2) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 23 ILM 1027.*
89 See par. 3.1.2 of this Ch.
90 Article I(1).
91 Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 184.
92 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 307.

directed against a civilian population and lastly, that a specific form of intention must be present.[93]

With regard to the question whether or not the content of the *Torture Convention* has become part of customary international law applicable during the period in question, some are of the view that the high threshold required for actions to constitute crimes against humanity was not met in the South African context.[94] With regard to torture, specific reference was made to article 7(2) of the *Rome Statute*, which requires the crime against humanity to be committed in the furtherance of a state policy to commit such violations. It is argued that there is not sufficient proof that torture was part of a state policy or even ordered by officials or persons at the highest political levels. It was therefore submitted that the crimes were not committed in a sustained and concentrated effort to violate rights but rather on a case by case basis.

Others are of the view that the crimes committed by the security forces in South Africa do indeed have a systematic and widespread nature.[95] Although the requirement of a "policy element" is denied in the case of torture, referred to above, it is argued that even if it was the case, it is clear that the crimes in question were in any event committed in the course of furthering and protecting *apartheid* as policy and could therefore be defined as crimes against humanity.

3.1.3 Does a duty to prosecute rule out amnesty?

Reconciliation between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty is said to be best achieved by drawing a distinction between permissible and impermissible amnesties, and by limiting international recognition to the latter.[96] There are no clear rules to distinguish between permissible and impermissible amnesties under international law, but it has been suggested that international recognition might be accorded where amnesty has been granted as part of a truth and reconciliation inquiry and each person granted amnesty has been obliged to

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93 Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 185.
94 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 326-327.
95 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 191.
96 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1009.

make full disclosure of the criminal acts as a precondition of amnesty and the acts were politically motivated.[97] Furthermore, certain qualifications truth commissions must meet if they are to serve as acceptable alternatives to prosecutions, have also been suggested.[98]

Reasons why not all amnesties are recognised, is said to include the abuse of amnesty by military dictatorships that have enacted "self-amnesty" laws before surrendering power. An example given is the blanket, unconditional amnesty given in Chile by Pinochet and his regime to themselves. Perhaps, it has been suggested, the most important reason is the internationalisation of crime in the global village.[99] Most of the atrocities, such as genocide, committed by dictators today are international crimes and *The Convention on Genocide* contains an absolute obligation to prosecute such offenders. Other examples of an obligation to prosecute can be found in the *Geneva Conventions* for grave breaches thereof and in judgments of the International Criminal Tribunal for the former Yugoslavia, which hold that amnesties for torture are null and void.[100]

Clearly there is place for (permissible) amnesty in international law today. The *Rome Statute* can further be used as support for this view. Despite the fact that the *Rome Statute* is silent on amnesty in that it does not recognise amnesty as a defence to prosecution, the provisions that were adopted at the Rome Diplomatic Conference has been held to reflect "creative ambiguity" which could potentially allow the prosecutor and judges of the ICC to interpret the *Rome Statute* as permitting recognition of an amnesty exception to the jurisdiction of the ICC.[101]

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97 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1009.
98 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1012.
99 Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1002.
100 *Prosecutor v. Furundžija* Case No. IT-95-171/1-T (10 December 1998); (1999) 39 ILM paras. 151-157 (1999). See Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1003.
101 Compare ss. 16, 17(1)(a), 20 and 53 of the *Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9)*. See Scharf MP "The Amnesty Exception to the Jurisdiction of the International Criminal Court" 1999 *CILJ* 521-525 and Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1013-1015.

3.2 The relevance of initial considerations for successive and additional measures

Evidently, there is enough support for the view that the South African TRC's amnesty scheme employed in the initial stages of South Africa's transition is recognised as a permissible "exception" or alternative to prosecutions in cases where an international duty existed to prosecute *apartheid* era crimes. It should also follow that, had there been an international duty to prosecute and amnesty was recognised as an acceptable "exception" or alternative thereto, it should be viewed as a "once off" and consequently those who did not benefit from the amnesty scheme should now be prosecuted in terms of the relevant international duty to do so.

On the other hand, had no international obligation existed from a strict legal perspective, as some argue, the analysis might well stop there.[102] Clearly, if there was no international duty on South Africa to prosecute based on international law applicable at the time, similarly there is no such duty now. Although South Africa has acceded to most of the international conventions in the meantime and although customary international law has developed over time, it has no retrospective effect. In this case, the possibility of a duty to prosecute should rather be explored through other avenues such as municipal law dealt with in more detail below.[103]

4 Countries that employed truth commissions

4.1 General

Truth commissions have their origin in the transitions from authoritarian regimes to democratic states in Latin America in the early 1980s where efforts at prosecution were obstructed by the continuing power held by former military regimes as well as the threat it posed to emerging democracy.[104] The National Commission on the Disappearance of Persons (CONADEP) of Argentina, established in 1983, was one of the first truth commissions and served as model for others in the region.

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102 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 328.

103 See par. 5.2 of this Ch. as well as Chs. 3 and 5 of this book.

104 Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence 2 http://www.humansecuritygateway.com/documents/CSVR_TrialsTruth Commissions SeekingAccountability_AftermathViolence.pdf [date of use 02 May 2010).

Following the Argentinean model, commissions of this kind have become popular in post-conflict or post-authoritarian transitions across numerous and varied contexts.

Differing characteristics have led to slightly different definitions of truth commissions and therefore counts of truth commissions. Since 1974, nearly fifty truth commissions worldwide have been established.[105] A table provided for at the end of this Chapter lists countries that employed truth commissions or similar bodies and serves as an example of the range of countries, contexts and types of commissions that have been established over the past 40 years.

4.2 South Africa

4.2.1 The Truth and Reconciliation Commission

In accordance with South Africa's negotiated settlement in 1995, Parliament enacted the *PNURA*. The *PNURA* provides for the creation of a Truth and Reconciliation Commission to establish a complete picture of human rights violations between 1960 and 1993, later extended to 1994. This was achieved by means of hearings and investigations to facilitate the granting of amnesty, to recommend reparation to victims, and to prepare a report containing recommendations of measures to prevent the future violations of human rights.

No person who has been granted amnesty in respect of an act, omission or offence shall, in terms of section 20(7) of the *PNURA*, be criminally or civilly liable in respect of such act, omission or offence. As mentioned above,[106] the Amnesty Committee received 7 112 applications for amnesty, of which 849 were granted, 5 392 were rejected, and 871 were withdrawn. The Amnesty Committee wound up its work and published its report in 2003.

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105 http://www.usip.org [date of use 6 May 2010]; Yav Katshung J *Truth Commissions and Prosecutions*; Hayner P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" 1994 *Human Rights Quarterly* (vol. 16) 600. See Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1005 Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence 3 http://www.humansecuritygateway. com/documents/CSVR_TrialsTruth Commissions SeekingAccountability Aftermath Violence.pdf [date of use 02 May 2010).

106 See par. 1 Ch. 1 of this book above.

4.2.2 *AZAPO v President of the Republic of South Africa 1996 4 SA 671 (CC)*

In this case, victims of *apartheid* abuses challenged the key amnesty granting section, namely section 20(7) of the *PNURA*, on the ground that it was inconsistent with section 22 of the *interim Constitution*.

The victims argued that the immunities granted to individual perpetrators from criminal and civil liability in terms of section 20(7) was in violation of their right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum enshrined in section 22 of the *interim Constitution*. In support of this challenge the applicants also argued that the state was obliged by international law, particularly the *Geneva Conventions* of 1949, to prosecute those responsible for gross human rights violations and that the provision of section 20(7) of the *PNURA*, which authorised amnesty for such offences, constituted a breach of international law.[107]

The Constitutional Court confirmed the victims' fundamental rights including human dignity,[108] life,[109] freedom and security of their person[110] and also recognised that should any of these rights be violated the victims ought to have the right to redress before civil or criminal courts and that the perpetrators must be held accountable. The Court then turned to the issue of amnesty and found that it impacts negatively on the above-mentioned fundamental rights.[111] The submission that an amnesty constitutes a violation of section 22 of the *interim Constitution* was therefore held to have considerable merits.[112] The question was whether or not such a violation, which effectively amounted to a limitation of the victims' fundamental rights, could be justified.

The Constitutional Court unanimously rejected the victim's challenge and held that the epilogue (postscript) to the *interim Constitution* trumped section 22 thereof and that section 20(7) of the *PNURA* was therefore constitutional. Policy

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107 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) 687 D-E par. 25. See Dugard J "Is the Truth and Reconciliation Process Compatible with International Law? An unanswered question" 1997 *SAJHR* 261.

108 Section 10 of the *Constitution*.

109 Section 11 of the *Constitution*.

110 Section 10 of the *Constitution*.

111 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par. 9.

112 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par. 10.

considerations such as the importance of amnesty to the 1993 political settlement and the incentive it provided for truth-telling, weighed more heavily with the court as opposed to answering the question as to whether or not international law obliges a successor regime to punish officials and agents of the predecessor repressive regime and its opposition for violations of international law.[113]

From an international law perspective, the judgment is therefore disappointing because it fails to address adequately the question whether conventional and customary international law oblige a successor regime to punish the officials and agents of a predecessor repressive regime for international crimes and thus gave support to the constitutional challenge advanced by the applicants.[114]

5 Countries that employed successive and/or additional measures to a truth commission

In this part a brief overview will be given of the various countries that employed successive and additional measures to a truth commission, in order to establish what the trend pertaining to this matter is and, with specific emphasis on South Africa, whether or not the same trend is followed.

With general reference to outstanding matters relating to the South African TRC amnesty scheme, the term "unfinished business" has become synonymous. Unjustly some also refer to prosecutions as part of the TRC's "unfinished business" while in fact, prosecutions never formed part of the TRC's mandate and therefore its business to finish.[115] It is rather government's "unfinished business" to which human rights and civil societies rightly have levelled criticism against.

This part forms the basis of this study and focuses on prosecutions as successive measures to the TRC's amnesty scheme aimed at those who had not applied for amnesty and those who had applied, but to whom amnesty was not granted on the one side, and Presidential pardons as additional measure aimed at those cases that fell outside the scope of the TRC as well as those that fell inside the

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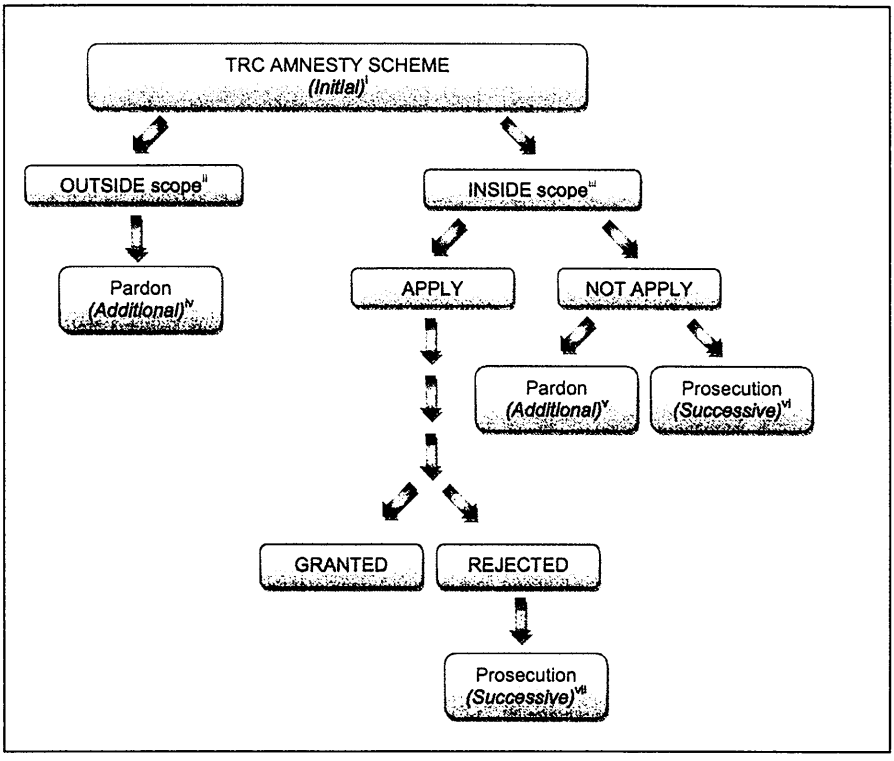
113 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) 698 A-F par. 50. See Dugard J "Is the Truth and Reconciliation Process Compatible with International Law? An unanswered question" 1997 *SAJHR* 261.

114 Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 68.

115 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 16-33.

scope but not brought before the TRC for political reasons on the other side. The following diagram sets out these measures with regard to which the subsequent discussion will take place.

DIAGRAM I



i Result of a negotiated settlement, namely, conditional amnesty through the TRC.
ii Crimes not committed with a political objective; crimes committed before 1960 and after 1994 and crimes committed outside the borders of South Africa.
iii Crimes committed with a political objective; crimes committed in the period 1960-1994 and crime committed inside the borders of South Africa.
iv The Special Dispensation on Presidential Pardons was an attempt to, amongst others, address the consequences of the political unrest in KZN which proceeded long after South Africa's transition to democracy in 1994.
v A target group includes a large number of members/supporters of the IFP, a political party that did not recognise the legitimacy of the TRC and hence did not participate in its proceedings.
vi Aimed at those who did not apply for amnesty.
vii Aimed at those who did apply for amnesty, but whose applications were unsuccessful.

5.1 General

In her study of fifteen truth commissions, Hayner states that prosecutions are "very rare" after a truth commission report, even where the identity of the perpetrators is known:[116]

> In only a few of the fifteen cases looked at [...] was there an amnesty law passed explicitly preventing trials, but in most other cases there was in effect de facto amnesty – prosecutions were never seriously considered...

Likewise it was found that in only a few cases, such as Bolivia and Argentina, have there been trials in conjunction with or as a result of the truth commission investigations.[117]

It was further observed that the very mandate of truth commissions generally prevent them from playing an active role in the prosecution versus amnesty decision that often follows a truth commission report, although some truth commissions have recommended prosecutions or forwarded their materials to the courts.[118]

Although Hayner's study refers to truth Commissions between 1974 and 1994, it is indicative of the fact that societies in transition are generally hesitant or unable to pursue or institute prosecutions as successive measures to a truth commission.

5.2 South Africa

5.2.1 Introduction

While upholding the constitutionality of the amnesty process, the Constitutional Court in the *AZAPO* case held that it did not deprive the victims absolutely of the right to prosecution in cases where amnesty had been refused.[119]

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116 Hayner P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" 1994 *Human Rights Quarterly* (vol. 16) 604. See Dugard J "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 *LJIL* 1005.

117 Hayner P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" 1994 *Human Rights Quarterly* (vol. 16) 604.

118 Hayner P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" 1994 *Human Rights Quarterly* (vol. 16) 604.

119 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC) par. 17. See Fernandez L "Post-TRC Prosecutions in South Africa" 74 in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 80.

In South Africa, the TRC favoured prosecutions and noted the following in its 1998 report:[120]

> Where amnesty has not been sought or has been denied, prosecution should be considered, where evidence exists that an individual has committed gross human rights violations. In this regard, the Commission will make available to the appropriate authorities, information in its possession concerning serious allegations against individuals (excluding privileged information such as that contained in amnesty applications). Consideration must be given to imposing a time limit on such prosecutions.
>
> Attorneys-General must pay rigorous attention to the prosecution of members of the South African Police Service who are found to have assaulted, tortured and/or killed persons in their care.

The TRC also proposed that all the trials instituted in terms of its report should be dealt with within a period of two years, but according to experts a ten-year period to complete these trials is more realistic.[121]

Furthermore, the TRC stressed that to avoid a culture of impunity and to entrench the rule of law in South Africa, the granting of general amnesty in whatever guise should be resisted.[122] This was recognised by former President Nelson Mandela in the special debate on the report of the TRC in Parliament on 25 February 1999:

> The TRC raises the issue of accountability and prosecution where there is evidence of human rights violations, and in particular in the case of members of the former South African Police who are found to have assaulted and/or killed persons in their care.
>
> Accountability does need to be established and, where evidence exists of a serious crime, prosecution should be instituted within a fixed time frame. That time frame needs to be realistic, taking into account how long it takes for evidence to be secured and preparations made for successful prosecution. Yet a time frame for this process is necessary; for we cannot afford as a nation and as government, to be saddled with unending judicial processes, which can easily bog down our current efforts to resolve problems of the past.

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120 TRC Report 2003 vol. 5 Ch. 8 par. 14.

121 TRC Report 2003 309. See Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 192.

122 TRC Report 2003 vol. 5 Ch. 8.

> These matters will, of course, be handled by the Office of the National Director of Prosecutions. And we believe that in discharging this responsibility, the Director will take into account not only the critical need to establish accountability and the rule of law, but also to advance reconciliation and the long-term interests of our country.

Whether or not the state had to pursue prosecutions based on the above, then became a vexed political issue.[123] This led to a number of questions:[124] Who will be targeted – only foot soldiers or those who orchestrated *apartheid*? Will it include liberation movements and in particular the ANC? Will prosecutions be even-handed?

The decision whether or not to prosecute is said to generally be a political one, or a reflection of political realities, that is taken outside a truth commission's sphere of influence.[125]

Pertaining to South Africa, Bubenzer also identifies political considerations as the key reason for the government's "dismissive attitude" towards post-TRC prosecutions.[126] A central factor focussed on is the fact that members of former liberation movements can also become the focus of the prosecutions authorities. In this regard reference is made to 37 high-ranking members of the ANC including former President Thabo Mbeki, President Jacob Zuma, former Minister of Justice Charles Nqakula and former Commissioner of Police and Jackie Selebi.

These 37 high-ranking members of the ANC[127] successfully applied for collective amnesty in November 1997 on the strength of a declaration from the ANC which stated that collective responsibility was assumed for all criminal acts committed by ANC members in the execution of its strategic and policy decisions

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123 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 364.

124 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 22.

125 Hayner P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" 1994 *Human Rights Quarterly* (vol. 16) 605.

126 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 97-166 and in particular 157-166 based on, amongst others, interviews conducted with a range of people involved in the matter. What is documented by Bubenzer presumably reflects the personal views of the particular people that were interviewed and not his findings based on such interviews. It is not clear whether Bubenzer made use of a single scientifically compiled questionnaire for all his interviews, which can affect the scientific value of his study.

127 Members of either the ANC'S National Executive Committee (NEC) which also directed the ANC's military wing Umkhonto we Sizwe (MK).

during the struggle against *apartheid*.[128] No particular acts or specified incidents were, however, mentioned in the application and based on the non-compliance with section 20(1) of the *PNURA* which requires that a particular crime should be disclosed, the Cape High Court in May 1998 overturned the decision of the Amnesty Committee.[129]

The above-mentioned criminal acts relate to, amongst others, bombing and landmine campaigns targeting state facilities and security force personnel and equipment during which civilians were injured and killed. On this issue the TRC Report is enlightening where it deals with the distinction between just cause and just means:[130]

> A venerable tradition holds that those who use force to overthrow or even to oppose an unjust system occupy the moral high ground over those who use force to sustain that same system ... This does not mean that those who hold the moral high ground have carte blanche as to the methods they use.

The TRC consequently found that this resulted in unjustifiable gross human rights violations and in principle therefore the relevant ANC members could face prosecutions.[131] This was said to have been successfully used as leverage by the Foundation for Equality before the Law calling for "even-handed" prosecutions, "equally" targeting ANC members.[132] It was further said not to be due to an interest in the prosecution and conviction of ANC members, but to pressurise the government to stop the arrests in the Chikane case. In 2004, when these arrests were eventually suspended, the NPA insisted that guidelines be provided to balance the sensitivities of national reconciliation in the prosecuting process.[133]

Other factors contributing to the lack of political will to pursue post-TRC prosecutions have also been highlighted. These include the fear that it could result in the recurrence of rifts between the ethnic groups and fuel alienation and

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128 TRC Report 2003 vol. 1 Ch. 7 par. 95.

129 *The National Party of South Africa and James Marren Simpson v The Chairperson; Committee on Amnesty of the Truth and Reconciliation Commission* (C) Unreported cases no. 3626/98, 3859/98, 3729/98 of 8 May 1998.

130 TRC Report 2003 vol. 1 par. 54.

131 TRC Report 2003 vol. 3 Ch. 6 paras. 500-512.

132 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 97-166 and in particular 157-166 based on, amongst others, interviews conducted with a range of people involved in the matter.

133 See further Ch. 3 of this book where the National Prosecutions Policy and its amendment to provide specific details in this regard are dealt with in detail.

accusations concerning the *apartheid* past impacting negatively on transformation and reconciliation. The concern therefore is that old wounds may be opened up and that some of the good effects the TRC had on nation-building will be tainted.

The answer to the question whether or not to prosecute has been held to lie in a balance between taking action against the abuses committed by the former regime, consolidating the new regime, and achieving reconciliation. At the same time, however, it has been held that there is no uniform or magic formula for deciding when prosecutions are appropriate.[134] Having regard to unique considerations in each specific country's transition, the following general guidelines have been proposed in determining whether or not to prosecute:[135]

a) The nature of the transition and whether the former regime is still capable of an effective uprising;

b) The type and extent of crimes;

c) The availability and reliability of evidence;[136]

d) The applicability of old and new laws;

e) The judiciary's capacity to guarantee fair trials;

f) The public perception of the intention behind the trials and the effect the trial could have on reconciliation;

g) The cost and resources in relation to other priorities; and

h) The effect of trials on investor confidence.

5.2.2 *Prosecutions*

The general advantages, disadvantages and obstacles of prosecutions in the context of transitional countries, will briefly be highlighted and a more thorough investigation of the obstacles of prosecutions will be conducted in Chapter 4 below.

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134 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 367.

135 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 367.

136 See the response of Pretorius T in Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 23-24.

Generally speaking, making those responsible for committing crimes face justice is a critical aspect of ensuring respect for human rights[137] as well as preventing future human rights violations.[138] It also consolidates the position of the new government as one bound by the rule of law,[139] and therefore, distinctively different to the regime of the past.[140]

On the other hand, prosecution does not always lead to positive results for a transitional society. A comparison to war crime trials has shown that it is difficult to meet the hopes and expectations of the victims in that they are generally not involved in the trials and are often denied the restorative experience of a process that focuses on them. It was pointed out that the aim of a trial is to attain a guilty verdict, not to assist victims in their recovery process. Although one of the fundamental purposes of a trial is to derive legal truth from the confrontation between opposing arguments, trials are held to be ill-suited to deal with the task of providing a complete history of past violations.[141] This is held to be specifically a result of their adversary nature where the duty of the prosecutor is to focus on limited facts relevant to the guilt of the individual before the court, and the duty of the defence is to challenge those facts.[142] An acquittal has also been said to have a disappointing and devastating effect on victims and the society in general.[143]

Prosecutions in transitional societies can be problematic as the new government is often weak and fragile and the burden of trials could add pressure and bring new reasons for polarisation, division and conflict.[144] The Constitutional Court in the *AZAPO* case recognised that South Africa was in a weakened and fragile

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137 Sarkin J "Crime and Human Rights in South Africa" in Sarkin J, Haeck Y and Vande Lanotte J (eds) *Resolving the Tension Between Crime and Human Rights: An Evaluation of European and South African Issues* (Maklu Antwerp 2001) 25-49. See Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 366.

138 Malamud-Goti J "Transitional Government in Breach: Why Punish State Criminals? Human Rights Quarterly (1990) 12 1 12. See Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 366.

139 See par. 4.5.1.1 Ch. 3 of this book below for the challenge against impunity based on the rule of law.

140 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 366.

141 Bassiouni MC *Introduction to International Criminal Law* (Transnational Publishers 2003) 712.

142 Villa-Vicencio C "Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet" 2000 *Emory Law Journal* 506-222. See Bassiouni MC *Introduction to International Criminal Law* (Transnational Publishers 2003) 712.

143 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 367.

144 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 368 to 369.

position in 1994.[145] At the time, the security forces were composed largely of members/supporters of the old regime, and had the new government pursued prosecutions, they could easily have been accused of pursuing "victor's justice".[146] Trials could further also have resulted in the re-opening of partially healing wounds and the rekindling of bitterness.

According to Sarkin,[147] this was certainly not the case in 2004 anymore when the question of whether to prosecute or have further amnesty was on the national agenda since the chances of prosecutions destabilising or even overthrowing the government in 2004 were very small.

Then again, as argued above,[148] the politics of post-TRC prosecutions could then have been and may very well still be the key reason for government's dismissive attitude towards these prosecutions as it has the potential of causing polarisation, division and conflict. This is especially in view of current occurrences of renewed racial tension brought about by the murder of former right wing Afrikaner Resistance Movement (AWB - *Afrikaner Weerstand Beweging*) leader, Eugene Terre'Blanche on 03 April 2010 amidst a case of hate speech where the court ordered the ANC Youth League leader, Julius Malema, to stop singing a liberation song which calls on freedom fighters of the ANC to "kill the boer"[149] or "shoot the boer"[150] Clearly the creed of reconciliation seems distant as such incidents continue to threaten national unity. It is therefore anticipated that the NPA, especially in view hereof, will be even more reluctant to institute prosecutions of politically motivated crimes.

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145 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC).

146 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 369.

147 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 369.

148 See par. 5.2.1 of this Ch.

149 In general the word "boer" refers to white Afrikaans speaking South Africans.

150 The issue of liberation songs is currently before South African courts as well as the ICC. The North Gauteng High court in Pretoria has interdicted Malema, from publicly singing the controversial liberation song or using similar words, which might be understood to incite violence. Bertelsman J ruled that the words constitute hate speech and that it cannot be justified under the right to freedom of speech. This was only a preliminary order until the similar case in the Equality Court is heard later in 2010. In the meantime, a formal complaint was also lodged at the ICC. According to an affidavit handed to the ICC, Malema incites his followers to rape, torture and murder Afrikaans farm owners by deliberately and intentionally during a period of several weeks called for, on national and international television and through the printed media, the killing of the "boer" and the farmer, intentionally committing the heinous international crimes of genocide, crimes against humanity, of murder, extermination, torture and rape.

If post-TRC prosecutions are to be pursued now, the fact that many of the *apartheid* era crimes were committed more than thirty years ago will pose unique practical challenges. One such consequence will be the prescription of the right to institute a prosecution for certain crimes.[151] The type of crimes[152] to be prosecuted and the classes of offenders[153] that could possibly be prosecuted also complicates matters. Organisational and financial constraints further limit the SAPS and the NPA in properly functioning.[154] Another consequence of the fact that many of the *apartheid* era crimes were committed more than thirty years ago is the availability and reliability of witnesses and evidentiary material.[155]

5.2.3 Further amnesty and Presidential pardons

The issue of prosecutions was dramatically raised when in May 2002 former President Thabo Mbeki pardoned 33 individuals, apparently members of the ANC and PAC.[156] Reaction to these pardons, while generally muted, came from various quarters. Emeritus Archbishop Desmond Tutu reacted by saying that these pardons:[157]

> ...would make a mockery of the TRC and eviscerate the entire TRC process...If it is true that those pardoned include several who had been refused amnesty by the TRC, then it seems to be the thin edge of a general amnesty wedge...a general amnesty...would, I think, be unconstructive unless it was linked to the issue of reparations for victims.

He added that it would also:[158]

> ...victimise the victims for a second time... [and a] de facto amnesty would shift international admiration of the TRC to condemnation of the new scheme.

This despite the comment of then Minister of Justice, Penuell Maduna, that:

> We are not starting any process of general amnesty, because, as you know, general amnesty has all sorts of implications. And indeed there was a reason why we didn't go that route and we went the TRC route in the first place.

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151 See par. 2 Ch. 4 of this book below.
152 See par. 2 Ch. 4 of this book below.
153 See par. 3 Ch. 4 of this book below.
154 See par. 4.1 Ch. of this book 4 below.
155 See par. 4.2 Ch. of this book 4 below.
156 See par. 1 Ch. 1 of this book above.
157 Battersby J "Tutu: Pardons Make a Mockery of TRC" Sunday Independent 18 May 2002.
158 Battersby J "Tutu: Pardons Make a Mockery of TRC" Sunday Independent 18 May 2002.

Notwithstanding the above, discussions on the possibility of a general amnesty after the publication of the final TRC report on amnesty in June 2002, have been occurring. This is said to be evident form a Cabinet statement to this effect that had been released. It was also reported that the Minister in the President's office, Essop Pahad, had stated in a speech that:[159]

> There are political forces in South Africa arguing for a general amnesty... Cabinet has to take that into account. Even if it disagrees, it has to explain why... Thus far there has been no consideration of these issues. The executive has not yet considered a report about the matter, or its proposals.

While there is acceptance that the Government was discussing an amnesty, it denied that the 33 pardons had anything to do with it. In accepting the final TRC report in March 2003, former President Thabo Mbeki stated that:[160]

> Let us start off by reiterating that there shall be no general amnesty. Any such approach... would fly in the face of the TRC process and detract from the principle of accountability, which is vital for the creation of a new ethos in our society. Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process...
>
> Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were on the receiving end of gross human right violation.
>
> We have therefore left the matter in the hands of the National Directorate of Public Prosecutions, to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted...

In the evaluation of the different scenarios, that of people not in prison who were refused amnesty and those who are still in prison because they were refused amnesty, it has been said that the Government is in the latter scenario in a much more difficult position.

For those not in prison, it was held that nothing needed to be done if the State was not intent on prosecuting them. For those in prison, various steps the State could take have been highlighted, namely parole, pardon or release. Even an amendment to the *PNURA* or brand new legislation was mentioned despite the

159 Anon "Cabinet Has Not Considered General Amnesty Yet" *Natal Witness* 5 June 2002.
160 Access to courts in terms of s. 34 of the *Constitution*.

acknowledgement of the difficulty to prove the constitutionality thereof. The *AZAPO* decision implies a presumption against blanket amnesty where the court held the following:[161]

> The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry granted automatically as a uniform past of compulsory statutory amnesia. It is specifically authorised for the purpose of effecting a constructive transition towards a democratic order.

The court also noted that:[162]

> What is clear is that Parliament not only has the authority in terms of the epilogue to make a law providing for amnesty...it is in fact obliged to do so.

The provisions referred to above which relate to amnesty in the *interim Constitution* are absorbed into the *Constitution* in terms of section 22 of Schedule 6, entitled "National Unity and Reconciliation":

> Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including the purposes of its validity.

Any attempt to enact new legislation or amend the *PNURA* will, according to Klaaren, therefore be interpreted not only in terms of the *interim Constitution*, but also examined in the light of the *Constitution*.[163]

It has also been pointed out that it could be that the State intends not pursuing many, if any, of those who were denied amnesty or did not make application for amnesty. It is held that this would effectively translate into a general amnesty.

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161 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par. 32.

162 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par. 14.

163 Klaaren J "A Second Organisational Amnesty?" (Unpublished paper delivered at the TRC: Commissioning the Past Conference University of the Witwatersrand Johannesburg 14 June 1999).

The Constitutional Court's pronouncements on the President's pardoning power in *Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Republic of South Africa* 1996 4 SA 744 (CC) should be remembered:[164]

> The power of the South African head of state to pardon was originally derived from royal prerogatives. It does not, however, follow that the power given in section 84(2)(j) is identical in all respects to the ancient royal prerogatives. Regardless of the historical origins of the concept, the President derives his power not from antiquity but from the NT[165] itself. It is that Constitution that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine any provision of the NT, that conduct would be reviewable.

The court has already examined these powers in specific circumstances to determine whether or not it could stand up to constitutional scrutiny. In *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) the court noted that there was a pardon provision due to:[166]

> ...a recognition in the interim Constitution that a power should be granted to the President to determine when, in his view, the public welfare will be better served by granting a remission of sentence or some other form of pardon. There are at least two situations in which the power to pardon may be important. First, it may be used to correct mistaken convictions or reduce excessive sentences and second, it may be used to confer mercy upon individuals or groups of convicted prisoners, when the President thinks it will be in the public benefit for that to happen...

Based on the above, it is said to be most likely in the current circumstances that the court would review any set of pardons, in relation to the conflict of the past on the basis of what is in the public interest.[167] It is further held that where the TRC has refused an amnesty especially where no political motive was found, it may be difficult to show public interest. On the other hand, it may be that political affiliation becomes the basis of indicating that, for purpose of reconciliation between political groups, such pardons serve the public interest. It may then be questioned whether or not these pardons infringe the equality provision in the *Constitution*.

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164 *Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Republic of South Africa* 1996 4 SA 744 (CC) par. 116.
165 New Text.
166 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paras. 44 and 45.
167 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 387.

When Goldstone J in the *Hugo* case examined the pardoning power of the President in terms of the *interim Constitution*, it was viewed in a wide manner and the court indicated that generally the court will not lightly overturn the President's discretion.[168]

In context, a set of pardons for the purpose of releasing those denied amnesty by the TRC could be challenged by victims or their families, or, indeed, someone still in prison who has not been granted amnesty. Such a situation was envisaged by the *Hugo* decision which recognises that:[169]

> Where the power of pardon or reprieve is used in general terms and there is an 'amnesty' accorded to a category or categories of prisoners, discrimination is inherent.

The Constitutional Court's judgment in *Pharmaceutical Manufacturers Association of SA In re: Ex Parte Application of the President of the Republic of South Africa* 2000 3 BCLR 241 (CC) brings clarity when the court made clear the following:

> ...that decisions are to be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary.

In the current context, according to Sarkin, it will therefore be necessary for the President to show "public interest". Furthermore, that it will also be necessary to show that what the President is attempting to achieve is contrary to law (the *PNURA*), as well as to the constitutional directive for a process for amnesty.

A blanket amnesty has therefore been ruled out as unlikely, but support for some sort of amnesty was clear, especially with regard to Eugene de Kock.[170] The manner in which the issue unfolded in South Africa will be dealt with in detail below.[171] With reference to Argentina, the consequences of a blanket amnesty, or pardons issued to perpetrators by the President, for the nation, reconciliation in general and the needs of victims in particular will be investigated.

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168 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 387.

169 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par. 31.

170 Du Preez M *Pale Native: Memories of a Renegade Reporter* (Zebra Press Cape Town 2003) 252

171 See Ch. 5 of this book below.

6 Conclusion

Transitional justice should be designed to attain and strengthen democracy and peace which are the key goals for societies picking up the pieces after periods of mass abuse. In achieving these goals a holistic approach taking into account the full range of factors that may have contributed to abuse is vital. A society's choices of measures dealing with these abuses are more likely to be effective if they also are based on a serious examination of other societies' experiences as they emerged from a period of abuse. This reduces the likelihood of repeating avoidable errors – errors transitional societies can hardly afford to make.[172]

Ultimately, there is no single formula for dealing with a past marked by large-scale human rights abuse. Although all transitional justice approaches are based on a fundamental belief in universal human rights, each society should choose its own path.[173] It has become clear that in some cases both prosecutions and truth commissions may be necessary to redress the legacy of past violence and should both be pursued with a view to manage the relationship as it unfolds in each context, be it simultaneously or individually.

Although transitional justice acknowledges that several measures complementing one another are necessary to bring about a successful transition, it is submitted that the focus should not only be on initial measures in this regard, but also on successive and additional measures. More research should therefore be done on societies in the aftermath of initial measures implemented to address their past, which could serve as an example to future societies in transition.

With regard to initial measures, the international position on prosecutions versus truth commissions remains an unsettled issue. It is, however, clear from the above that there is room for permissible amnesty in international law and that truth commissions through which such amnesty scheme can be established became more popular over time. The relevance of initial considerations for successive and additional measures, as has been indicated above, is that if an international duty to prosecute is established, and amnesty is recognised as an acceptable "exception" or alternative thereto, it should be viewed as a "once off". Consequently, unsuccessful

172 Anon 2009 What is Transitional Justice? www.ictj.org/en/tj [date of use 2 May 2009].
173 Anon 2009 What is Transitional Justice? www.ictj.org/en/tj [date of use 2 May 2009].

applicants for amnesty and un-cooperative perpetrators should be prosecuted in terms of the relevant international duty to do so.

Even if an international duty to prosecute cannot be established in a particular country, due to the non-applicability of relevant international instruments, for example, the possibility of a national duty to prosecute can still be investigated. Specifically pertaining to South Africa, such a national duty can arguably be construed from the very nature of the result of the negotiated settlement that was accepted in which hard compromises were reached, one of them being that there would be no large-scale prosecutions of *apartheid* officials and agents who committed gross human rights violations.[174]

The Constitutional Court in the *AZAPO* case scrutinised the TRC's amnesty scheme and while upholding the constitutionality thereof, the Court held that it did not deprive the victims absolutely of the right to prosecution in cases where amnesty had been refused. Both the state and the TRC therefore knew and expected that, once the Amnesty Committee had reached the end of its mandate, prosecutions had to be instituted as the only credible alternative to amnesty. From this it also follows that additional measures such as further amnesty or Presidential pardons should not be permitted, for it allows for a "second bite at the amnesty cherry" or "re-run of the TRC", which is in stark contrast to what all parties were initially committed to.

According to some, there is little doubt that South Africa's choice of granting amnesty through the TRC to persons who have committed gross human rights violations is not in accordance with international law.[175] The same can arguably also be said about South Africa's initiatives post-TRC.

Very few other countries implemented successive or additional measures in the aftermath of truth commissions and judging by South Africa's poor progress in this regard, it can serve as an indication that the trend set by other countries will be continued in South Africa.

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174 Fernandez L "Post-TRC Prosecutions in South Africa" 74 in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 80

175 Dugard J "Retrospective Justice: International Law and the South African Model" in McAdams AJ (ed) *Transitional Law and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press 1997) 279. See Fernandez L "Post-TRC Prosecutions in South Africa" 74 in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 78

Reasons for the above could be that countries focus and place all hope on initial measures without the necessary foresight and emphasis on the fact that more than one measure is usually necessary for successful and comprehensive transition and reconciliation. Although theoretically speaking, as mentioned above, prosecutions are the only credible alternative to amnesty, practice has shown that political considerations are decisive. Due to the fact that the entire process is concerned with crimes committed with a "political objective", political considerations play a role and a dominant one at that, be it in the initial stages or thereafter. This is because the reasons why prosecutions are not immediate and viable options in the initial stages do not necessarily dissipate over time. Time alone does not heal.

The "politics of prosecutions" in a post-TRC phase also generates tension between two concepts, namely "justice at the expense of peace" and "no peace without justice". On the one hand it is feared that prosecutions could result in the recurrence of rifts between the ethnic groups and fuel alienation and accusations concerning the *apartheid* past impacting negatively on transformation and reconciliation. The concern therefore is that old wounds may be opened up and that some of the good effects the TRC had on nation-building will be tainted. It has also been pointed out that those who oppose prosecutions argue that trials serve as a perpetuation of human rights abuse and not as a remedy. Here too decisions about who is prosecuted and who is not are held to be political in which case it will undermine the trials and be seen as nothing more than victor's justice.[176]

On the other hand, it is clear that without prosecuting those who have to be prosecuted, the entire TRC process will unravel into a farce. Much of the credibility it has won both nationally and internationally will dissipate if the final phase of the TRC process is left hanging in mid-air.[177] Indeed, the concept of amnesty makes no sense unless it is linked to a credible alternative that a person who has not successfully applied for an amnesty may be prosecuted.[178] In this regard it is said that the failure to prosecute may signal to future perpetrators that the consequences

176 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 366.

177 Fernandez L "Post-TRC Prosecutions in South Africa" 74 in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 80.

178 Bennun ME "Some procedural issues relating to Post-TRC prosecutions of human rights offenders" 2003 *SACJ* 18-19.

of not seeking amnesty may be minimal.[179] The basic argument in support of prosecutions is therefore that trials are necessary in order to bring violators of human rights to justice and to defer future repression. It may further also ensure that victims do not take the law into their own hands and exact revenge on perpetrators.[180]

It is also necessary to bear in mind that reconciliation includes punitive justice where necessary.[181] Prosecutions will, according to Fernandez, serve as painful reminder that a democratic legal order which places a high premium on the inviolability of the physical integrity and dignity of the person can come down very harshly on those who believe that they are above the law.[182] From the point of view of establishing public trust in the organs of justice and in the rule of law, it is essential that those who have shown utter contempt for the lives of others, who have heaped abuse on the amnesty process, be prosecuted without fear, favour or prejudice.[183]

179 Slye RC Comment on the papers by Fernandez L in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 84.

180 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia Antwerp 2004) 366.

181 Du Plessis W "The South African Truth and Reconciliation Commission: The Truth Shall Set You Free" in Foblets M and Von Trotha T (eds) *Healing the Wounds: Essays on the Reconstruction of Societies after War* (Hart Publishing Oxford and Portland Oregon 2004) 195.

182 Fernandez L "Post-TRC Prosecutions in South Africa" 74 in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 81

183 Fernandez L "Post-TRC Prosecutions in South Africa" 74 in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 81.

TABLE I

List of countries that employed truth commissions

Sources: http://www.usip.org [date of use 6 May 2010]; Hayner P "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" 1994 *Human Rights Quarterly* 600; Yav Katshung J 2008 Truth Commissions and Prosecutions: Two sides of the same coin? http://www.restorativejustice.org/10fulltext/yav-katshung-joseph.-2008.-truth-commissions-and-prosecutions-2026two-sides-of-the-same-coin/view [date of use 18 Mar 2009]; Stan L 2008 Truth Commissions http://www.scitopics.com/Truth_Commissions.html [date of use 18 Mar 2009]; and Valji N 2009 Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence http://www.humansecuritygateway.com/documents/CSVR_TrialsTruthCommissionsSeekingAccountability_AftermathViolence.pdf [date of use 2 May 2010].

	COUNTRY	DATE	NAME
1	Uganda	1974	Commission of Inquiry into the disappearance of People in Uganda since 25 January, 1971
2	Brazil	1979	Brazil: No More
3	Bolivia	1982	National Commission for Investigation for Forced
4	Zimbabwe	1983	Zimbabwe Commission of Inquiry into the Matabeleland Disturbances
5	Argentina	1983	National Commission on the Disappeared
6	Uganda	1986	Commission of Inquiry into Violations of Human Rights
7	Peru	1986	Commission of Inquiry to Investigate the Massacre of Prisoners
8	The Philippines	1986	The Presidential Committee on Human Rights
9	Nepal	1990	Commission of Inquiry to Locate the Persons who Disappeared during the Panchayat Period
10	Chile	1990	National Commission for Truth and Reconciliation
11	Chad	1990	The Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories
12	Germany	1992	Study Commission for Working Through the History and the Consequences of the SED Dictatorship in Germany
13	El Salvador	1992	Commission on the Truth for El Salvador
14	Ethiopia	1993	The Special Prosecution Process by the Office of the Special Prosecutor
15	Rwanda	1993	International Commission of Investigation on Human Rights Violations in Rwanda Since October 1, 1990
16	Sri Lanka	1995	Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons
17	Haiti	1995	National Truth and Justice Commission

18	Germany	1995	Study Commissions for Overcoming the Consequences of the SED Dictatorship in the Process of German Unity
19	Burundi	1995	International Commission of Inquiry for Burundi
20	South Africa	1995	Commission of Truth and Reconciliation
21	Ecuador	1996	Truth and Justice Commission
22	Guatemala	1997	Commission for Historical Clarification
23	Rwanda	1999	National Unity and Reconciliation Commission
24	Nigeria	1999	Human Rights Violations Investigation Commission
25	Uruguay	2000	Commission for Peace
26	South Korea	2000	Presidential Truth Commission on Suspicious Deaths
27	Cote d'Ivoire	2000	Mediation Committee for National Reconciliation
28	Panama	2001	Panama Truth Commission (Comisión de la Verdad de Panamá)
29	Peru	2001	Truth and Reconciliation Commission
30	Serbia and Montenegro	2002	Truth and Reconciliation Commission for Serbia and Montenegro
31	Timor-Leste (East Timor)	2002	Commission for Reception, Truth and Reconciliation
32	Sierra Leone	2002	Truth and Reconciliation Commission
33	Ghana	2003	National Reconciliation Commission
34	Democratic Republic of Congo	2003	Truth and Reconciliation Commission
35	Chile	2003	National Commission on Political Imprisonment and Torture
36	Algeria	2003	Ad Hoc Inquiry Commission in Charge of the Question of Disappearances
37	Paraguay	2004	Truth and Justice Commission
38	Morocco	2004	Equity and Reconciliation Commission
39	United States	2005	Greensboro Truth and Reconciliation Commission
40	Fiji	2005	Reconciliation and Unity Commission
41	Liberia	2006	Truth and Reconciliation Commission of Liberia
42	Ecuador	2007	Truth Commission to Impede Impunity
43	Canada	2008	Truth and Reconciliation Commission
44	Solomon Islands	2009	Truth and Reconciliation Commission
45	Kenya	2009	Truth, Justice and Reconciliation Commission

CHAPTER 3

A DECADE AFTER THE TRC IN SOUTH AFRICA: THE NATIONAL PROSECUTING POLICY RELATING TO POST-TRC PROSECUTIONS

1 Introduction

The policy amendments relating to post-TRC prosecutions have been the topic of much recent debate and various concerns have been raised regarding its formulation, interpretation and application.

The provisions contained in annexure A to the amended National Prosecuting Policy will be analysed and evaluated. In this regard, specific emphasis will be placed on the criteria governing the decision to prosecute in part C thereof which is said to contain the actual amendments. The additional criteria that were incorporated are said to be strikingly similar to the factors applied by the Amnesty Committee in deciding whether or not to grant amnesty. The relevant criteria in part C will therefore be compared with the factors in section 20 of the *Promotion of National Unity and Reconciliation Act* 34 of 1995 (*PNURA*) and the submission that a decision to decline a prosecution, based on these criteria, would amount to an effective indemnity also referred to as a "prosecutorial indemnity" and ultimately result in a re-run of the TRC, will be evaluated in the broader context of the transformation phase South Africa is facing at the moment.

The *Nkadimeng*-challenge[184] will further be evaluated by analysing the parties' arguments and the court's decision. The applicants challenged the validity of the policy amendments, based on the above-mentionded submission, and requested the court to strike them down as being in violation of the rule of law and the separation of powers, various provisions in the Bill of Rights,[185] administrative law, international law, regional human rights instruments and foreign law.

The effect of the court's decision on further prosecutions will finally be considered in anticipation of the manner in which this matter will unfold.

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184 *Nkadimeng v National Director of Public Prosecutions* (32709/07) 2008 ZAGPHC 422.
185 Ch. 2 of the *Constitution*.

2 The process followed in amending the National Prosecuting Policy

Section 179(5) of the *Constitution* determines that the National Director of Public Prosecutions (NDPP) must determine, with the concurrence of the Cabinet member responsible for the administration of justice,[186] and after consulting with the Directors of Public Prosecutions (DPP), prosecution policy and policy directives,[187] which must be observed in the prosecution process.

The NDPP may also intervene in the prosecution process when such policy is not complied with.[188] The NDPP may further review a decision whether or not to prosecute, after consultation with the relevant DPP and after taking representations from the accused, the complainant or any other relevant person.[189] All other matters concerning the NPA must be determined by national legislation.[190]

The empowering provision in this regard is section 21(1) of the *National Prosecuting Authority Act* 32 of 1988 which reads as follows:

> The National Director shall, in accordance with section 179(5)(a) and (b) and any other relevant section of the Constitution-
>
> (a) with the concurrence of the Minister and after consulting the Directors, determine prosecution policy; and
>
> b) issue policy directives, which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecutions policy, as determined in this Act or any other law.

The National Prosecution Policy,[191] was determined in terms of the above-mentioned provisions, and in paragraph 4 thereof it sets out general criteria governing the decision whether or not to prosecute.[192] These criteria were, however, regarded insufficient to assist the NDPP in arriving at decisions relating to offences which arise from conflicts of the past, namely *apartheid* era crimes. As a result, it was recommended that the process of post-TRC prosecutions required more specific

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186 Exercising final responsibility over the NPA in terms of s 179(6) of the *Constitution*.
187 S 179(5)(b) of the *Constitution*.
188 S 179(5)(c) of the *Constitution*.
189 S 179(5)(d) of the *Constitution*.
190 S 179(7) of the *Constitution*.
191 See schedule "I".
192 The National Prosecution Policy par. 4.

policy guidelines to facilitate the structured conclusion of the matter and it was decided that the National Prosecution Policy had to be amended accordingly.

In Chapter 1,[193] mention was made of a report issued by the Amnesty Task Team which gave rise to the amendments to the National Prosecuting Policy. This undated report, titled "Report: Amnesty Task Team", was disclosed during the proceedings in the *Nkadimeng*-challenge[194] and revealed that the government Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed an Amnesty Task Team which, as mentioned earlier,[195] had to consider and report on, amongst other things, a consideration of a process of amnesty on the basis of full disclosure of the offences committed during the conflicts of the past.

In order to give effect to the "arrangements" contemplated by President Mbeki in his statement to the National Houses of Parliament on the occasion of the Tabling of the Report of the TRC on 15 April 2003, the Amnesty Task Team recommended the creation of a Departmental Task Team comprising members of the Department of Justice and Constitutional Development (DOJ&CD), the Intelligence Agencies, the South African National Defence Force, the South African Police Service (SAPS), Correctional Services, the NPA and the Office of the President.

The functions of the proposed Departmental Task Team would be to:

a. consider the advisability of the institution of criminal proceedings for an offence committed during the conflicts of the past and make recommendations to the National Director of Public Prosecutions; and to

b. consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to:

    i. the President, through the Minister for Justice, to pardon the alleged offender in terms of section 84(1)(j) of the *Constitution*;[196] and

193 See par. 1 Ch. 1 of this book.
194 See par. 4 in Ch. 3 of this book below.
195 See par. 1 Ch. 1 of this book.
196 *Constitution of the Republic of South Africa*, 1996 (*Constitution*).

ii. the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.

Significantly, the proposed Departmental Task Team was required to receive information or representations from victims, perpetrators, and legal representatives or any other person or institution regarding any specific matter.

Eventually, the National Prosecution Policy was amended by the insertion of a new paragraph 8A. In terms of this afore-mentioned paragraph the NDPP may supplement or amend the National Prosecution Policy so as to determine prosecutorial policy and directives in respect of specific matters. Accordingly, the NDPP formulated the prosecuting policy and directives relating to prosecution of criminal matters arising from conflicts of the past in appendix A[197] to the amended National Prosecution Policy with effect from 01 December 2005.

The process followed by the NPA with the amendment of the National Prosecuting Policy has been criticised for the lack of consultation in that no provision was apparently made for representations from affected parties, despite the fact that the original task team recommended a process of full public participation.[198] It was therefore alleged that the adoption of the policy amendments infringed section 3(2)(b)(ii) of the *Promotion of Administrative Justice Act* 3 of 2000[199] which requires that a reasonable opportunity to make representations must be granted to a person whose rights or legitimate expectations are materially and adversely affected by administrative action. The merit of this allegation will be evaluated in paragraph 4.3.3 of this Chapter below where the question whether or not the adoption of the policy amendments constitutes administrative action will be answered.

The lack of consultation in the adoption of the policy amendments is said to be in glaring contrast to the consultative process followed in the establishment of the TRC itself. Public participation in the establishment of the TRC has been hailed as an example of participatory democracy, which in turn is widely accepted as the cornerstone of good governance, while the absence of any participation in the

197 See schedule "II".
198 Applicant's Heads of Argument par. 10.25.
199 *Promotion of Administrative Justice Act* 3 of 2000 (*PAJA*).

adoption of the policy amendments, according to critics, is not a reflection of what should take place in a participatory democracy.[200]

The NPA, however, held that the policy amendments were indeed a product of a broad and intense consultation process with the help of a broad spectrum of entities including academic institutions and community organisations. Although the NPA did not dispute the allegation that the original task team recommended a process of full public participation, they could arguably have noted that section 179(5)(a) of the *Constitution* empowers the NDPP to execute his or her prosecutorial discretion in the formulation of prosecution policy and directives that need to be observed in the prosecution process, without requiring any form of public participation in the formulation of such.[201] It could also have been argued that although it is generally accepted that the formulation of prosecution policy and directives is part and parcel of the functions of the executive, the public should not be allowed to participate in such a process so as to preserve the independence of the NPA.

3 The policy amendments

Appendix A consists of three parts, namely, an introduction (part A); the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past (part B); and the criteria governing the decision whether or not to prosecute (part C).

3.1 Part A: Introduction

The introduction sets out the background and context of the policy amendments as well as the build-up to prosecutions since the establishment of the TRC.[202] Paragraph 1 of the policy amendments encapsulates essential features of Government's response to the final report of the TRC which should, amongst other things, according to paragraph 2 of the policy amendments, be taken into consideration when interpreting and applying the policy amendments.

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200 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 18.

201 Part A, par. 3(c) of the policy amendments.

202 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 19.

Paragraph 1(a) of the policy amendments points out that there may be a difference between the political leaders who said: "This is what we have done" and made public their role in the struggle, but may not have been granted amnesty for some technical reason, and the generals and politicians who got together in a conspiracy of silence seeking to undermine the very compromise that was negotiated as a way of healing the nation.[203]

Paragraph 1(b) of the policy amendments acknowledges that a continuation of the amnesty process will not only be an insult to the TRC and detract from the principle of accountability, which is vital for the creation of a new ethos in our society, but that it would also be unconstitutional, as it would amount to a suspension of victims' constitutional rights.[204] This paragraph goes on to state that prosecution is left in the hands of the NPA as is normal practice.

Paragraph 1(c) of the policy amendments opens the door to those with information at their disposal who are prepared to co-operate with the NPA and Intelligence Agencies in exposing the truth. This can be done by entering into arrangements that are standard in the normal execution of justice and the prosecuting mandate and are accommodated in our legislation. This paragraph also states that these arrangements should be entered into in the national interest and therefore not undermine nation building.

Paragraph 1(d) of the policy amendments narrows down the scope and applicability of the policy amendments to those atrocities committed before 11 May 1994. It should, however, be borne in mind that these atrocities may very well be linked and intertwined with networks still operating and posing a threat to current security. The prescription of crimes also impacts on the scope and applicability of the policy amendments; therefore specific mention is made of the non-prescriptivity of the crime of murder.[205]

Paragraph 2 of the policy amendments sets out various factors upon which to reflect and attach due weight in interpreting and applying the policy amendments. Mentioned first and foremost is the human rights culture, which underscores the *Constitution*, and the status accorded to victims in terms of the TRC and other

203 Bizos G "Why Prosecutions are Necessary?" 8 in Villa-Vicencio C and Doxtader E (eds) *The Provocations of Amnesty: Memory, Justice and Impunity* (David Philip Claremont 2003).
204 Access to courts in terms of s 34 of the *Constitution*.
205 Part A, par. 2(c) of the policy amendments.

legislation. Clearly the intention is that the policy amendments and the *Constitution* should be used in a balanced manner, working towards what is in the best interest of victims.

The *dictum* of the Constitutional Court was also considered; firstly, by placing prosecutions in perspective, by referring to the *AZAPO* judgment[206] which justified the constitutionality of the amnesty process, *inter alia*, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused and secondly by recognising the international duty to prosecute *apartheid* era crimes with reference to *S v Basson*.[207]

Legal obligations which are placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with, should further be considered along with the existing National Prosecutions Policy to assist prosecutors in exercising their functions without fear, favour or prejudice. Furthermore, the terms and conditions under which the Amnesty Committee could consider applications for amnesty and the criteria for granting amnesty are also of relevance. As will be seen in paragraph 5 and also referred to in paragraph 4.3 of this Chapter below, this aspect is highly controversial.

Paragraph 3 of the policy amendments goes on to assert that Government did not intend to mandate the NDPP, under the auspice of his or her own office, to perpetuate the TRC amnesty process. The paragraph refers to "existing legislation and normal process" on which the policy amendments rely and include section 179 of the *Constitution* and sections 105A and 204 of the *Criminal Procedure Act* 51 of 1977 (*CPA*). Section 105A permits the NPA and a legally represented accused to enter into a plea and sentence agreement in terms of which the accused pleads guilty to a specified charge, subject to the imposition of a specified sentence. Section 204 permits the NPA to grant indemnity from prosecution to accomplices or

206 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC).

207 *S v Basson* 2003 3 All SA 51 SCA; 2004 6 BCLR 620 (CC) and 2005 12 BCLR 1192 (CC).

accessories who testify for the prosecution against major co-offenders. Sections 105A and 204 will be examined below.[208]

Paragraph 4 of the policy amendments deals with the NPA's general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence which is likely to be imposed.

(e) The interests of the community and the public interest.[209]

In the event of the NPA declining to prosecute an alleged offender, such a person can, however, be privately prosecuted in terms of section 7 of the *CPA*. Therefore if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court. Private prosecutions are, however, not regarded as a credible alternative as will be discovered in paragraph 4.4 of this Chapter below.

Paragraph 5 of the policy amendments makes reference to the equality provisions in the *Constitution* and equality legislation regarding the handling of cases. Despite the acknowledgement of equality, Steward[210] raised concern on even-handedness and warned that if the NPA does not act in a scrupulously even-handed manner, it would be difficult to avoid the perception that the trials that would ensue would be political trials. In reaction to Steward's question as to whether the list of names referred to the NPA contains names of both sides of the struggle, Pretorius[211] gave the assurance that it does. Pretorius also stressed that a prosecutor is dependent on evidence and that evidence is available as it is available.

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208 See Ch. 4 of this book below.

209 "Community" refers to the relevant community affected by the crime and "public" to the general public at large.

210 Interview with Steward in Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 24-26.

211 Interview with Pretorius in Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 23-24.

He went on by stating that it cannot always be ensured that all evidence that is available on all sides will be there and that the evidence will always be even-handed.

3.2 Part B: Procedural arrangements

Those wishing to make representations contemplated in part A, paragraph 1(c) of the policy amendments, should, according to part B, paragraphs 1 to 3 of the policy amendments, do so in the form of an affidavit containing a full disclosure of all the facts relevant to the offence, including all information which may uncover any network, person or thing posing a threat to security. Receipt of such must then be confirmed by the NDPP and provision is made for the request for further particulars where necessary.

In terms of paragraphs 4 to 8 of the policy amendments, it was decided to centralise all of these cases in the office of the NDPP, mainly to ensure consistency in decision making and because the NDPP must be consulted on and approve all decisions pertaining to prosecution and offers for the application of sections 105A and 204 of the *CPA*. The PCLU is responsible for overseeing the investigations and instituting prosecutions assisted by senior designated officials of various departments and other components of the NPA.

In paragraph 9 of the policy amendments, provision is made for the NDPP to obtain the views of various parties where it is necessary and reasonable to do so before arriving at a decision whether or not to prosecute.

The decision of the NDPP must be made public and if he or she decides not to prosecute, the reasons therefore must also, according to paragraph 10 of the policy amendments, be made public and, according to paragraph 11 of the policy amendments, the Minister of Justice should also be informed of all decisions. The NDPP may further, according to paragraph 12 of the policy amendments, make public statements on any matter arising from the policy amendments where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister of Justice.

Further representations, such as a request by the accused to have charges against him or her withdrawn, were foreseen and provided for in paragraph 13 of the policy amendments. In such cases the victims must, as far as reasonably possible, be consulted.

Paragraph 13 of the policy amendments provides that:

> The victims must, as far as reasonably possible, be consulted in any such further process and be informed...

Concern has, however, been expressed that despite the explicit wording of paragraph 13 of the policy amendments, interested parties will be left in the dark and that, unlike the TRC, the procedure will probably be carried out behind closed doors.[212] To balance out this concern, it should be borne in mind that like any other criminal trial, circumstances may arise where it is in the interest of justice not to hold proceedings in public, especially in sensitive cases such as these.[213]

Paragraph 14 of the policy amendments leaves the door open for any additional procedures the NDPP may provide for in the execution of his or her duties.

All information obtained from an alleged offender during the process should not, according to paragraph 15 of the policy amendments, be used against such a person in any subsequent criminal trial.

3.3 Part C: Criteria governing the decision to prosecute

Apart from the general criteria set out in paragraph 4 of the National Prosecuting Policy, this part prescribes criteria which should be used "in a balanced way" in coming to a decision whether or not to prosecute.

Paragraphs 1 and 2 of the policy amendments determine that if the alleged offence has been committed on or before 11 May 1994 and if prosecution can be instituted on the strength of adequate evidence after applying paragraph 4 of the National Prosecuting Policy, further criteria set out in paragraph 3(b) of the policy amendments must be considered to determine whether or not the alleged act, omission or offence is associated with a political objective. Other criteria include the

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212 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 20.

213 See s. 153 of the *CPA* on circumstances in which criminal proceedings shall not take place in open court.

degree of co-operation offered on the part of the alleged offender (paragraphs 3(c) and (h) of the policy amendments), personal circumstances of the alleged offender (paragraph 3(d) of the policy amendments) and the seriousness of the offence (paragraph 3(e) of the policy amendments).

Very important are paragraphs 3(d)(iv), (f) and (g) of the policy amendments, which acknowledge the overall consideration of nation-building through transformation, reconciliation, development and reconstruction of the South African society and the clear notion that further or renewed traumatisation of victims must be prevented where reconciliation has already taken place. These paragraphs were among those specifically highlighted by the court in the *Nkadimeng*-challenge as will be seen in paragraph 4.6 of this Chapter below.

Lastly, paragraphs 3 (i) and (j) of the policy amendments leave the door open to take into consideration any views obtained and any further criteria deemed necessary in reaching a decision.

To Sooka,[214] these criteria are unclear, confusing and disturbing. This is mainly because she holds the opinion that focus is on perpetrators who were given a generous opportunity to come forward during the amnesty period and who chose either not to make use of it or to mislead the Amnesty Committee.

4 Challenge on the validity of the policy amendments: The N*kadimeng* challenge

4.1 Background

The first applicant is the sister of a former courier for the military wing of the ANC, namely *Umkhonto we Sizwe* (MK), who was allegedly abducted by the security branch while on a mission. To date neither she nor her remains have been found. During the TRC, evidence emerged that implicated a number of people in the possible abduction, assault and killing of the first applicant's sister, but no one has yet been charged.

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214 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 21-22.

The second to fifth applicants are the widows of what is commonly referred to as the "Cradock four". Their husbands were allegedly intercepted and stopped by members of the former security branch on their way to a meeting scheduled by the United Democratic Front. A few days thereafter, their bodies were found burnt and mutilated. During the TRC, several security branch members were implicated, but many of them have also not yet been prosecuted.

The sixth to the eighth applicants are non-governmental organisations[215] concerned as interested parties in the protection of the *Constitution*. The respondents include the NDPP, the Minister of Justice and eight other parties.[216]

4.2 Introduction

On 19 July 2007 the applicants launched a challenge requesting the Gauteng North High Court to strike down the 2005 amendments to the National Prosecution Policy.

The main issue raised by the applicants was that the application of the policy amendments in relation to a decision not to prosecute, even in cases where there is sufficient evidence to support prosecution, on the basis of the criteria contained in part C of the policy amendments, has the effect of affording the perpetrators of *apartheid* era crimes "prosecutorial indemnity".

As was mentioned in paragraph 1 of this Chapter above, the criteria contained in part C of the policy amendments are said to be strikingly similar to the factors contained in section 20 of the *PNURA* which had to be considered by the Amnesty Committee in deciding whether or not to grant amnesty. The applicants highlighted the following similarities between the criteria in part C of the policy amendments and the factors contained in section 20 of the *PNURA*:

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215 Khulumani Support Group, The Centre for the Study of Violence and Reconciliation (CSVR), and The International Centre for Transitional Justice (ICTJ).

216 Eric Alexander Taylor; Gerhardus Johannes Lotz; Johan Martin van Zyl; Hermanus Barend du Plessis; Willem Helm Coetzee; Anton Pretorius; Frederick Barnard Mong and Msebenzi Timothy Radebe.

TABLE II

ANNEXURE A – PART C	**SECTION 20 *PNURA***
Paragraph 1 ...the alleged offence must have been committed on or before 11 May 1994.	**Section 20(2)** ...offence or delict...advised, planned, directed, commanded, ordered or committed...during the period 1 March 1960 to the cut-off date (11 May 1994)...
Paragraph 3(a) ...the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.	**Section 20(1)(c)** ...the applicant has made a full disclosure of all relevant facts,
Paragraph 3(b) ...the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past.	**Section 20(1)(b)** ...the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past...
Paragraph 3(b)(i) ...the motive of the person who committed the act, commission or offence.	**Section 20(3)(a)** ...the motive of the person who committed the act, omission or offence;
Paragraph 3(b)(ii) ...the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.	**Section 20(3)(d)** ...the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
Paragraph 3(b)(iii) ...whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.	**Section 20(3)(e)** ...whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter;

Paragraph 3(b)(iv)	Section 20(3)(f)
...the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued,	...the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued,
Paragraph 3(b)(iv)(aa)	**Section 20(3)(f)(i)**
...but does not include any act, omission or offence committed - for personal gain;	...but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted - for personal gain...
Paragraph (b)(iv)(bb)	**Section 20(3)(f)(ii)**
...but does not include any act, omission or offence committed - out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.	...but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted - out of personal malice, ill-will or spite, directed against the victim of the acts committed.

It was further submitted that should the court agree that such a decision not to prosecute constitutes an effective "prosecutorial indemnity", such an indemnity would be unlawful and in violation of the rule of law and the separation of powers, various provisions in the Bill of Rights, administrative law, international law, regional human rights instruments and foreign law.

The respondents strongly denied that the policy amendments have this effect. The respondents held that the adoption of the policy amendments were in accordance with the constitutional mandate placed on the NDPP by the *Constitution* with the objective of the prosecution of crime. It was submitted that the policy amendments, if correctly considered, were not intended to be a re-run of the TRC. It was made clear that the policy amendments do not establish a process in terms of which individuals are to receive any amnesty and that the NDPP is not authorised to grant such amnesty. In addition to the above, the respondents gave the assurance that it would only conclude "agreements" as contemplated in part A, paragraph (c) of the policy amendments,[217] with the application of sections 105A and 204 of the *CPA*.

217 See par. 3.1 of this Ch. above.

The applicants made it clear that they do not allege that the policy amendments expressly allow for an amnesty, an indemnity or a re-run of the TRC based on a decision on the part of the NPA to conclude a section 105A plea and sentence agreement or to offer a state witness an indemnity in terms of section 204. In fact, it was held that the employment of the above-mentioned sections would only be possible where a decision had been made to prosecute. The applicant's complaint arises only where a decision is made not to pursue a prosecution at all.

The controversial issue was rather that of representations envisaged in part A, paragraph 1(c) and provided for part B, paragraph 1 to 3 of the policy amendments. Representations can, in terms of these provisions, be made by those who are facing prosecutions[218] and those who have already been prosecuted and wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate and are accommodated in legislation,[219] specifically sections 105A and 204 of the *CPA*.

The court was troubled by these representations which are apparently aimed at assisting the NDPP to decide whether or not to prosecute. The court asked the following question: If the above-mentioned representations were aimed at assisting the NDPP to decide whether or not to prosecute and not to grant indemnity, how the NDPP had hoped to get full disclosure as intended because unless it intends not to prosecute those who make full disclosures, it cannot hope that any person who runs the risk of being prosecuted by his or her own disclosure will come forward.

The court further stressed that sections 105A and 204 of the *CPA* have nothing to do with the decision to prosecute. The implementation of these two sections is subject to judicial consideration and is a matter of discretion by the trial court once a decision has been made to prosecute.

4.3 The plain meaning of the policy amendments

The criteria governing the decision whether or not to prosecute contained in part C of the policy amendments is held to contain the actual amendments. The applicants referred to the title of part C of the policy amendments "Criteria governing the decision whether or not to prosecute in cases relating to conflicts of the past" and

218 See part B, par. 1 of the policy amendments.
219 See part A, par. 1(c) of the policy amendments.

argued that the plain meaning thereof is to clearly allow the NPA to make its decision based on the criteria set out in part C of the policy amendments and more specifically on a basis other than the strength of the case against the alleged perpetrator.

It is not clear why the applicants leaped to this conclusion based on the wording of the title alone. If one is to read further than the title, part C of the policy amendments makes it clear from the outset that these criteria are determined *apart* from the general criteria as set out in paragraph 4 of the National Prosecutions Policy. Paragraph 4(b) of the National Prosecutions Policy specifically refers to the strength of the case for the state and for the defence by taking the admissibility, credibility, reliability and availability of evidence into account.

4.4 An "effective" immunity?

The respondents argued that the policy amendments can be defended on the basis that they do not remove the victim's right to institute a private prosecution or seek civil recourse against perpetrators once a decision not to prosecute has been made and a *nolle prosequi* certificate has been issued.

The applicants, on the other hand, held that private prosecutions are not commonplace[220] in South Africa and are beyond the means of most victims. The reasons therefore were said to be that private prosecutions are time consuming and costly, that a private prosecutor does not have sufficient recourses in gathering evidence and that there is only a narrow class of people that can institute private prosecutions because they have either died or are poor.

Civil remedies were also said to be of no real practical relief due to the fact that the crimes in question were committed more than 20 years ago, which means that any civil claim they may have given rise to, have already prescribed.

Based on the above, the applicants submitted that the suggested recourse by the respondents is not reasonable. It was furthermore submitted that even if the barriers to private prosecutions were not so significant, the availability thereof would

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220 According to the applicants, a brief survey of the South African Law Reports since 1947 indicated only three successful private prosecutions: *Coupen Holdings v Germiston City Council* 1961 2 SA 659 (T); *Ismail v Durban Corporation* 1971 2 SA 606 (N); *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1992 3 SA 562 (N).

not benefit the respondents as a defence against the claim that the policy amendments infringe the Bill of Rights.

The suggestion on the part of the respondents that victims are able to pursue private prosecutions was also said to be a clear acknowledgment that the criteria in part C will not only be used for purposes of the implementation of sections 105A and 204 of the *CPA* as was affirmed by the respondents, but that it would also be used in the course of a decision whether or not to prosecute. This is because private prosecutions are only possible where there has been a decision not to prosecute. The applicants further stressed the fact that neither section 105A nor section 204 of the *CPA* is relevant to a decision not to prosecute, which is true, but the possibility of making use of these mechanisms can, however, play an important role in the decision-making process because it will undoubtedly affect the strength of the state's case by attempting to secure evidence.

4.5 Legal challenges

4.5.1 Rule of law and separation of powers

4.5.1.1 Rule of law

The applicants aptly started off by quoting section 1(c) of the *Constitution*:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (c) Supremacy of the constitution and the rule of law.

It was submitted that the "prosecutorial indemnity" undermines the rule of law in that it allows perpetrators of serious crimes to escape prosecution which will give rise to various perceptions on the part of the public, impacting negatively on the rule of law.

The relationship between crime and the rule of law, as recognised by the Constitutional Court in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 3 SA 280 (CC); 2004 5 BCLR 455 was highlighted with the following quote:[221]

> Crime strikes at the very core fabric of our society. It undermines some of the fundamental human rights enshrined in our Bill of Rights...It undermines the rule of law, a foundational value of our constitutional democracy...The State has a constitutional duty to eliminate crime. The obligation flows generally from its obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

Reference was also made to recent decisions taken by the European Court of Human Rights (ECHR) in this regard.[222] Emphasis was placed on the recognition of "public interest in obtaining the prosecution and conviction of perpetrators particularly in the context of war crimes and crimes against humanity" which is:[223]

> ...essential in maintaining public confidence in their adherence to the rule of law and preventing any appearance of collusion in or tolerance of unlawful acts.

It was also submitted that the "prosecutorial indemnity" threatens the independence of the prosecution authorities, and therefore the rule of law, because the nature of the criteria set out in part C of the policy amendments permit the prosecution authorities to selectively exercise their prosecutorial discretion in a politically partisan manner. The Privy Council held that:[224]

> It is a grave violation of their professional and legal duty to allow their judgment to be swayed by extraneous considerations such as political pressure.

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221 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 3 SA 280 (CC); 2004 5 BCLR 455 par. 144.

222 *Brecknell v United Kingdom* (unreported judgment of the ECHR no 32457/04 27 Nov) par. 69; *McCartney v United Kingdom* (unreported judgment of the ECHR no 34575/04 27 Nov) par. 29 and *McGrath v United Kingdom* (unreported judgment of the ECHR no 34651/04 27 Nov) par. 26.

223 *McKerr v The United Kingdom* no. 28883/95 par. 111 and 114 ECHR 2001-III.

224 *Sharma v Brown-Antoine* 2007 1 WLR 780 (PC) 786 (cited with approval in *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N) par. 179).

4.5.1.2 Separation of powers

Section 179(4) of the *Constitution* requires that:

> National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

According to the Constitutional Court in the *Certification* case:[225]

> There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.

The importance of the independence of the prosecution authority *vis à vis* the executive was highlighted by the court in *S v Yengeni* where it was held that:[226]

> The untrammelled exercise of their powers in a spirit of professional independence is vital to the functioning of the legal system.

It was alleged that the policy amendments violate the separation of powers and the independence of the NDPP by allowing the executive access to, and undue control over, the decision-making process.

The applicants sketched a background to this allegation by pointing out that the executive was extensively involved in the development and formulation of the policy amendments. This was said to be evident from the proposal that decisions relating to the prosecution of crimes arising from conflicts of the past would be evaluated by a multi-departmental committee which would make recommendations to the president in terms of a proposed *Indemnity Act*. It was further proposed that the committee should work under the direct supervision of an inter-ministerial committee which, in turn, should work towards the NDPP. State law advisors had pointed out that the process might be seen as an attempt by Government to exert undue pressure on the NDPP in reaching a decision.

According to the applicants, it is clear from the policy amendments in part B paragraph 6 that it allows for involvement of the executive in the decision-making of the prosecution authorities:

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225 *Ex parte Chairperson of Constitutional Assembly, In re Certification of Constitution of the RSA* 1996 4 SA 744 (CC); 1996 10 BCLR 1253 par. 146.

226 *S v Yengeni* 2006 1 SACR 405 (T) par. 52.

The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

(a) The National Intelligence Agency.

(b) The Detective Division of the South African Police Service.

(c) The Department of Justice & Constitutional Development.

(d) The Directorate of Special Operations

The point was made, and validly so, that the NPA is not constitutionally designed to make judgments in relation to the political desirability of prosecutions because it is not a democratically elected institution that is subject to political control. The public interest should, however, in terms of paragraph 4(c) of the National Prosecutions Policy be considered in deciding whether or not to prosecute. Despite this, the applicants maintained that questions of high policy, such as the correct political approach to post-TRC prosecutions are the domain of the legislature as was the case with the TRC, which was constitutionally mandated and enacted by means of legislation.

4.5.2 The Bill of Rights

It was submitted that the "prosecution indemnity" infringes various rights in the Bill of Rights and that these rights are not subject to limitation.[227] Specific emphasis was placed on the right to equal protection before the law,[228] the right to dignity,[229] the right to life,[230] and the right to freedom and security of the person.[231]

4.5.2.1 Section 9

Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

The applicants claimed that the "prosecutorial indemnity" results in victims of the crimes covered by the policy amendments, like themselves, being treated less

227 S 36 of the *Constitution.*
228 S 9 of the *Constitution.*
229 S 10 of the *Constitution.*
230 S 11 of the *Constitution.*
231 S 12(1) of the *Constitution.*

favourably than the victims of other crimes, in relation to whether or not the State fulfils its obligation to prosecute the perpetrators of the said crimes.[232]

This differentiation was held to constitute unfair discrimination. In addition to the infringement of their own right to equality, the applicants also pointed out that the "prosecution indemnity" also unfairly discriminates against those perpetrators who sought and obtained amnesty at the TRC.

This presumption the applicants relied on only comes into operation if it is established that the discrimination complained about is founded on one or more of the grounds[233] listed in subsection 3 of the equality clause.[234] It is not clear on which listed ground or grounds the applicants based their contention and it rather seems as if they used an analogue ground in which case the presumption that discrimination in unfair does not come into operation and that they consequently had to prove that the discrimination is unfair.

The relevance of the victims' rights to equality in relation to the issue of the prosecution of perpetrators of human rights violations is specifically referred to in a 2005 UN document[235] in the following terms as quoted by the applicants:[236]

> 3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: ... Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; ... Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
>
> ...
>
> 12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.

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232 Applicant's Heads of Argument par. 9.20.
233 Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
234 S 9(5) of the *Constitution*.
235 UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law: Human Rights Resolution 2005/35, items 3 and 12.
236 Applicant's Heads of Argument par. 9.23.

4.5.2.2 Section 10

> Human dignity
>
> Everyone has inherent dignity and the right to have their dignity respected and protected.

The value of the right to dignity was stressed by not only relying on the enshrining provision in the *Constitution*, but also on the interpretation thereof by the Constitutional Court in the *AZAPO*[237] and *S v Makwanyane*[238] judgments.

The applicants specifically relied on the *AZAPO* judgment, where an indemnity which was said to be similar to the kind challenged in *Nkadimeng*, was recognised as having the potential to infringe the right to human dignity.

The Constitutional Court held that:[239]

> Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack...

S v Makwanyane is of further significance in this regard. The Constitutional Court held that the intrinsic worth of victims would be degraded when perpetrators of the most serious crimes are afforded further and open-ended opportunities to escape justice at the expense of their victims.[240] According to the applicants, the effect of the above is not limited to the victims, but extended to their families, communities and the South African society as a whole. In this regard reference was made to the concept of *ubuntu,* which can be translated to "I am what I am because we are what we are". Mokgoro J conceptualised human dignity as part of *ubuntu* or humaneness, in which the community or group plays an indispensable role:[241]

> While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.

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237 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC); 1996 8 BCLR 1015.
238 *S v Makwanyane* 1995 3 SA 391 (CC).
239 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC); 1996 8 BCLR 1015 par. 17.
240 *S v Makwanyane* 1995 3 SA 391 (CC) per O'Regan J par. 44.
241 *S v Makwanyane* 1995 3 SA 391 (CC) per Mokgoro J par. 308.

The important role the dignity of victims plays in the 2005 *United Nations Principles of the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights*[242] was also highlighted by the applicants in quoting sections 18 and 22 thereof, namely:

> 18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition...
>
> 22. Satisfaction should include, where applicable, any or all of the following:
>
> (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim...

The applicants alleged that the "prosecutorial indemnity" infringes their right to have their inherent dignity respected and protected in that it:[243]

> Protect[s] the perpetrators of gross human rights at the expense of victims and the victim's families;
>
> Cause[s] suffering to victims and victims' families by denying them justice;
>
> Prevent[s] victims and victim's families from reaching closure or resolution of past injustices;
>
> Dishonour[s] the respect, dignity, value and acceptance of victims and victims families in the wider community; [and]
>
> Demean[s] South African society as a whole by betraying the constitutional compact made with victims as enshrined in the epilogue to ... the Interim Constitution and by undermining the purpose and spirit behind the TRC.

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242 UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law: Human Rights Resolution 2005/35, 2005 items 18 and 22.

243 Applicant's Heads of Argument par. 9.1.

4.5.2.3 Section 11 and 12(1)

> Section 11 – Life
>
> Everyone has the right to life.
>
> Section 12(1) – Freedom and security of the person
>
> (1) Everyone has the right to freedom and security of the person, which includes the right-
>
> ...
>
> *(c)* to be free from all forms of violence from either public or private sources;
>
> *(d)* not to be tortured in any way; and
>
> *(e)* not to be treated or punished in a cruel, inhuman or degrading way...

The applicants' challenge, founded on these rights, was based on the State's obligation to take reasonable measures, including the institution of prosecutions to address violent crime. The Constitutional Court confirmed this obligation in *S v Basson*:[244]

> The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.

This obligation was also confirmed in various other judgments of the Constitutional Court and the Supreme Court of Appeal (SCA)[245] as well as in other jurisdictions.[246] According to the applicants, the failure to prosecute crime therefore constitutes an infringement of the right upon which the crime directly impinges.

The applicants went further and made reference to the reasoning in another ECHR judgment[247] quoted by the Constitutional Court in the *Carmichele* case[248]

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244 *S v Basson* 2005 1 SA 171 (CC); 2004 1 SACR 285; 2004 6 BCLR 620 paras. 31-33.

245 *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); 2001 10 BCLR 995; 2002 1 SACR 79 par. 44, approved in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC); 2005 4 BCLR 301 par. 71; *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)* 2002 4 All SA 346 2003 1 SA 389 (SCA) par. 13, citing *S v Baloyi (Minister of Justice and Another Intervening)* 2000 2 SA 425 (CC) par. 11.

246 The right to life (which is couched in a 2(1) of the *European Convention of Human Rights* in similar terms to s 11 of the *Constitution*) has recently been interpreted by the European Court of Human Rights (ECHR) in *Brecknell v United Kingdom* (unreported judgment of the ECHR no 32457/04 27 Nov) paras. 65-66. See also Applicants Heads of Argument par. 9.14.

247 *Osman v United Kingdom* (2000) 29 ECHR 245 par. 142.

where the court appeared to accept that even a system of civil immunity could itself constitute an infringement on the right to life. It was submitted[249] that the same reasoning applies in the circumstances of a criminal immunity such as the "prosecutorial indemnity" under consideration in the *Nkadimeng*-challenge.

4.5.2.4 Section 36

> Limitation of rights
>
> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

No right in the Bill of Rights is absolute and can be limited in terms of the limitations clause.[250] Such a limitation is, however, only possible if the qualifications set out in section 36 are met. With specific emphasis on "...in terms of law of general application", the applicants referred to the judgment in the *Hugo* case, where reference was made to a number of Canadian judgments in which it had been found, for a variety of reasons, that internal government directives and policies do not constitute law of general application because they are not law in that they:[251]

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248 *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); 2001 10 BCLR 995; 2002 1 SACR 79 par. 47.

249 Applicant's Heads of Argument par. 9.17.

250 S 36 of the *Constitution*.

251 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); 1997 6 BCLR 708 par. 101, referring to *Committee for Commonwealth of Canada v Canada* (1991) 77 DLR (4th) 385 per Lamer CJ 401; *McKinney v University of Guelph* (1991) 76 DLR (4th) 545 604 and citing Hogg PW *Constitutional Law of Canada* 3rd ed (Carswell Scarborough Ontario 1992) 35-12 fn 54.

> ...are not generally published, and therefore are unknown to the public[252]...[are] binding only on government officials, and could be cancelled at will. (citations omitted)

The applicants concluded by holding that since the policy amendments do not constitute law of general application, it cannot limit the rights enshrined in sections 9, 10, 11 and 12(1) of the *Constitution* by not prosecuting those alleged human rights violators responsible for the infringements of these rights.

4.5.3 Administrative law

The applicants' administrative law challenge was founded on the assumption that the adoption of the policy amendments constituted administrative action in terms of section 33 of the *Constitution*, read together with the definition of administrative action in section 1 of *PAJA*. Section 33 of the *Constitution* recognises the right to administrative action that is lawful, reasonable and procedurally fair. The *PAJA* was enacted to give effect to section 33(3) of the *Constitution*.

Section 33 of the *Constitution*

> Just administrative action
>
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must-
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration.

252 On this point, Mokgoro J delivered a minority judgment in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) in which she did not regard the publication requirement as that important and held that the President's power to pardon does indeed come down to "law of general application" because it is can be compared with ancillary legislation.

Section 1 of *PAJA*

Definitions

In this Act, unless the context indicates otherwise-

'administrative action' means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law; [Para. (gg) substituted by s. 26 of Act 55 of 2003.]

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1).

In their alternative prayer, the applicants sought to have the adoption of the policy amendments reviewed and set aside in terms of section 6 of *PAJA*.

Section 6 of *PAJA*

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or

ii) is not rationally connected to-

aa) the purpose for which it was taken;

bb) the purpose of the empowering provision;

cc) the information before the administrator; or

dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2) *(g)*, he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

It is trite law that the formulation of policy does not constitute administrative action. Formulation can also be understood to include the adoption of amendments. The formulation of prosecution policy and directives is part and parcel of the functions of the Executive which is explicitly excluded by section 1 of *PAJA*.

In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*[253] the SCA held that, whether or not particular conduct constitutes administrative action, depends primarily on the nature of the power that is being exercised rather than the identity of

253 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 JOL 14415 (SCA).

the person who exercises such power. The court referred to the construction of section 33 of the *Constitution* and found that features of administrative action do not extend to the exercise of legislative powers by legislative bodies, to the ordinary exercise of judicial powers, to the formulation of policy or the initiation of legislation by the Executive, nor to the exercise of original powers conferred upon the President as head of state.[254] The Constitutional Court also stated explicitly in *President of the Republic of South Africa v South African Rugby Football Union*[255] that formulating policy is a constitutional responsibility of the executive branch and cannot be construed as administrative action. It distinguished this function from implementation, which is typically administrative.

The court in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*[256] further held that administrative action is rather, in general terms, the conduct of the bureaucracy in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.[257]

Given that the applicants' assumption that the adoption of the policy amendments constituted administrative action is incorrect, it is clear that the applicants would not have succeeded with their administrative law challenge in their alternative prayer had they not succeeded with the main challenge. It serves little purpose to explore the grounds on which they sought to challenge the action as section 6 of *PAJA* will not apply if section 33 of the *Constitution* read together with section 1 of *PAJA* is not overcome.

The question is whether or not the applicants' challenge could have succeeded had they focussed on the application of the policy amendments rather than on its formulation. From the outset the applicants did, however, express their concern with the application of the policy amendments, but did not base their challenge theron:[258]

> Firstly, the applicants do not allege that the policy amendments expressly allow for an amnesty, indemnity or a re-run of the TRC, as the respondents suggest. Rather, the

254 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 JOL 14415 (SCA) par. 24.
255 *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) par. 142.
256 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 JOL 14415 (SCA).
257 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 JOL 14415 (SCA) par. 24.
258 Applicants' Heads of Argument par. 2.1 (emphasis added).

> applicants allege that the *application* of the policy amendments in relation to a decision not to prosecute will have this effect.

It is submitted that this challenge too would not have been successful. The application of the policy amendments, especially part C thereof, amounts to a decision whether or not to prosecute. Section 1(b)(ff) of *PAJA* excludes a decision to *institute* or *continue* a prosecution from the definition of administrative action, but does not specifically deal with the decision to *decline* a prosecution or to *withdraw* charges.[259]

The intention behind this provision, reflected in the draft Administrative *Justice Bill*[260] as controversial, was to confine review under *PAJA* to decisions to *decline* a prosecution. It was held that there is less need to review decisions to *institute* or *continue* prosecution as types of administrative action, since such decisions will result in a trial in a court of law.[261] The aim of the exclusion is therefore:

> ...to avoid a multiplicity of hearings about the "merits" of criminal charges, which must be determined at the trial and through the antecedent steps envisaged by the *Criminal Procedure Act* 51 of 1977.

The Constitutional Court in *Samual Kanunda v The President of the Republic of South Africa*[262] was for that reason prepared to assume that different considerations apply to a decision to *decline* a prosecution, and that there may possibly be circumstances in which such a decision could be reviewed by a court.[263]

On the other hand it can be argued that the decision-making process is one action, based on the facts and circumstances of the particular case and taking the prescribed criteria into consideration. The outcome (whether or not to prosecute) will merely be a reflection of the weight attached to these considerations. Section 1(b)(ff) of *PAJA* could therefore also be interpreted to exclude the decision-making process of the NPA, irrespective of the outcome.

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259 S 1(b)(ff) of the *PAJA*.

260 South African Law Reform Commission Draft Bill that formed part of the Law Commission's (Project 115) *Report on Administrative Justice* (1999) 17 n 7.

261 Hoexter C *Administrative Law in South Africa* (Juta Cape Town 2007) 213-214.

262 *Kaunda v President of the Republic of South Africa* CCT 23/04 2004 ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC). See Watney M *Prosecutorial delay in withdrawing charges subsequent to a decision not to prosecute: A reviewable Administrative Action?* 2005 *TSAR* 197.

263 *Kaunda v President of the Republic of South Africa* CCT 23/04 2004 ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) par. 84.

The view that the exclusions listed under section 1(b) of *PAJA* are absolute or unqualified does, however, not enjoy overall support. In *R v Director of Public Prosecutions ex parte Kebeline* and *R v Director of Public Prosecutions ex parte Rechaci*[264] it was held that decisions should, in exceptional circumstances, including dishonesty and *mala fides,* still be reviewable despite their exclusion. In a recent and controversial case, the NPA withdrew charges against Jacob Zuma (now President of the Republic of South Africa). This decision is said to be politically motivated and could arguably qualify as an "exceptional circumstance" and therefore capable of being reviewed. Various parties indicated that they intend to have the decision reviewed while others deny the possibility thereof. Whether or not the challenge will be allowed is uncertain, but the outcome will without doubt contribute to the debate on judicial review of the decisions of the NPA and hopefully the court will seize the opportunity to bring about legal certainty concerning the matter.

The applicants could have challenged the adoption of the policy amendments based on the principle of legality.[265] Section 33 of the *Constitution* requires administrators to act lawfully, reasonably and procedurally fairly, and to give reasons in certain circumstances; more particularly because the detailed content of legality has been encapsulated in a list of grounds for review in section 6 of *PAJA*.[266]

Legality, however, has a wider meaning that goes beyond administrative action and governs the use of all public power. Legality is an aspect of the rule of law and it suggests that "the exercise of public power is only legitimate where lawful".[267] In a number of cases involving non-administrative action, the courts held that the principle of legality implies that the body exercising public power has to act within the powers lawfully conferred on it,[268] that the holder of public power is required to act in good faith and not misconstrue its powers[269] and that the exercise of public power should not be arbitrary or irrational.[270]

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264 *R v Director of Public Prosecutions ex parte Kebeline* and *R v Director of Public Prosecutions ex parte Rechaci* 1999 4 All ER 801 (HL).
265 Hoexter C *Administrative Law in South Africa* (Juta Cape Town 2007) 214.
266 Hoexter C *Administrative Law in South Africa* (Juta Cape Town 2007) 116-117.
267 Hoexter C *Administrative Law in South Africa* (Juta Cape Town 2007) 117.
268 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras. 56 and 58.
269 *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) par. 148.
270 *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) par. 85.

Chaskalson CJ in *Minister of Health v New Clicks South Africa (Pty) Ltd*[271] held the view that the principle of legality acts as a safety net since it gives the courts some degree of control over action that is not administrative action for purposes of *PAJA* or section 33 of the *Constitution*, but still involves the use of public power.

4.5.4 International law

At the outset it should once again be emphasised that post-TRC prosecutions are not concerned with the international crime of *apartheid*.[272] The policy amendments make mention of "crimes committed before 11 May 1994, which emanate from conflicts of the past". Although these crimes were committed during the *apartheid* era, they constitute ordinary crimes in South African municipal criminal law.[273] It is further important to bear in mind that these crimes are no different from the crimes with regard to which people were able to apply for amnesty for before the Amnesty Committee.

However, this is not apparent from the applicants' international law challenge. Focus was rather on the amnesty debate in public international law. The applicants' main argument was that the "prosecutorial indemnity" obstructs the prosecution of various crimes such as *apartheid* for which there is a clear duty to prosecute, based on the fact that the prohibition on *apartheid* forms part of *jus cogens* from which no derogation is permitted. The applicants made their opinion on amnesty and prosecutions clear by referring to various international instruments condemning amnesty.

4.5.4.1 Introduction

The applicants began by describing the place of international law in the South African legal system by referring to section 39(1)(b) of the *Constitution*:[274]

> (1) When interpreting the Bill of Rights, a court, tribunal or forum-
>
> ...
>
> *(b) must* consider international law; ...

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271 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC).
272 See Ch. 2 of this book above.
273 Part A, par. 2 (c) of the policy amendments specifically refers to the crime of murder.
274 Emphasis added.

The relationship between South African law and international law is principally regulated by sections 231 and 232 of the *Constitution*. The applicants referred to these sections in drawing a distinction between the law of treaties and customary international law. Sections 231 and 232 of the *Constitution* respectively provide as follows:

> Section 231
>
> (1) The negotiating and signing of international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.
>
> Section 232
>
> Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The applicants also relied on case law and quoted a passage from *S v Makwanyane* where it was held that non-binding international law may also be considered when interpreting the provisions in the Bill of Rights:[275]

> In the context of *section* 35(1), public international law would include non-binding as well as binding law. They may both be used under the *section* as tools of interpretation. (emphasis in the original; citation omitted)

275 *S v Makwanyane* 1995 3 SA 391 (CC) par. 35 quoted in *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) par. 26.

In *S v Basson*,[276] the Constitutional Court considered the application of international law and specifically emphasised South Africa's international obligations with respect to upholding the principles of international humanitarian law.[277]

Despite the fact that the crimes in question do not include the international crime of *apartheid*, the applicants found the following passage significant where the Constitutional Court confirmed that the NPA is obliged, under international law, to prosecute crimes of *apartheid*:[278]

> ...the State's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the State to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.

Reference was further made to South Africa's membership of the UN and the Human Rights Council (HRC) which brings about additional responsibilities in protecting and promoting human rights.[279]

The applicants then considered the status of the "prosecutorial indemnity" and submitted that it contravenes the Bill of Rights as interpreted in view of international and foreign law. The applicants went to lengths to prove that indemnity from prosecution is not permissible. The current international opinion on amnesty under international law was explored in detail in Chapter 2 of this book above, but for purposes of this Chapter reference will only be made to the grounds on which the applicants founded their international law challenge.

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276 *S v Basson* 2005 1 SA 171 (CC) par. 171.
277 Applicants' Heads of Argument par. 11.2.6.
278 *S v Basson* 2005 1 SA 171 (CC) 189E-G par. 37.
279 A 55(c) of the UN Charter, 26 Jun 1945, entered into force 24 Oct 1945; UN General Assembly Res. 60/251, 15 Mar 2006, U.N. Doc. A/RES/60/251, 3 Apr 2006 par. 9. See Applicants' Heads of Argument par. 11.3.

4.5.4.2 International treaty law

The International Covenant on Civil and Political Rights (ICCPR)[280]

It was submitted that the "prosecutorial indemnity" effectively provides the NDPP with authority to deprive those whose rights and freedoms have been violated of an effective remedy; by impeding access to a judicial remedy and by failing to ensure that competent authorities enforce such remedies. This was said to be in breach of the rule of law enshrined in section 1 of the *Constitution* as interpreted in view of section 2(3) of the *ICCPR* which determines that:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Section 34[281] of the *Constitution* on the right to access to courts is also relevant even though the applicants did not rely on this provision. It was, however, pointed out that the remedies that should be afforded in cases involving serious human rights violations must be essentially judicial.[282]

It was further argued that the "prosecutorial indemnity" infringes the right to life[283] and the right to freedom and security of a person[284] as interpreted in view of sections 6(1) and 7 of the *ICCPR* which respectively determine that:

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280 South Africa ratified the ICCPR on 10 Dec 1998 and it came into force on 10 Mar 1999.

281 "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

282 The view taken by the HRC in *Coronel et al v. Colombia*, Comm. No. 778/1997, U.N. Doc. CCPR/C/76/D/778/1997 par. 11 (2002); *Nydia Erika Bautista v. Colombia*, Comm. No. 563/1993, U.N. Doc. CCPR/C/55/D/563/ 1993 par. 8.2. (1995); HRC, Concluding Observations on Argentina, UN. Doc. CCPR/CO/70/ARG (2000) par. 9.

283 S 11 of the *Constitution*.

284 S 12 of the *Constitution*.

Section 6(1)

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Section 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...

The applicants also relied on the jurisprudence of the HRC[285] and General Comments 6[286] and 20[287] on the implementation of articles 6 and 7 which confirm the sentiments that those who violate the above-mentioned provisions must be brought to justice.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 23 ILM 1027

Section 12 of the *Constitution* prohibits cruel, inhuman or degrading treatment and here it was held that the "prosecutorial indemnity", blocks the effective investigation, prosecution and punishment of violations of the *Torture Convention*, thereby violating the principle of the rule of law enshrined in section 1 of the *Constitution* as interpreted in view of articles 4, 7, 12 and 13 of the *Torture Convention*.

Pursuant to Article 4(1) and (2) of the *Torture Convention*, each State Party shall:

...ensure that all acts of torture are offences under its criminal law...make these offences punishable by appropriate penalties which take into account their grave nature.

Under Article 7(1) of the *Torture Convention* each State Party shall:

...submit the case to its competent authorities for the purposes of prosecution.

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285 S 6. See *Barbato v Uruguay*, CCPR/C/17/D/84/1981 and *José Vicente et. al v Columbia*, CCPR/C/60/D/612/1995. S 7. See *Rodríguez v Uruguay*, CCPR/C/ 31/D/194/1985.

286 ICCPR General Comment 6 (Sixteenth session, 1982): Article 6: The Right to Life, A/37/40 (1982) 93 par. 3.

287 ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193 par. 13.

Article 12 goes further by asserting that each State Party shall:

> ...ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed...

Article 13 of the *Torture Convention* determines that each State Party shall:

> ...ensure that any individual who alleges...torture...has the right to complain to, and to have his case promptly and impartially examined by, competent authorities.

Reference was also made to the observations[288] and decisions[289] of the Committee against Torture. Emphasis was placed on States' obligation to investigate, prosecute and punish those responsible for acts of torture on a prompt and impartial basis.

International Convention for the Protection of All Persons from Enforced Disappearance

Although South Africa had not yet signed and ratified the *International Convention for the Protection of All Persons from Enforced Disappearance* (*Disappearance Convention*) at the time, the applicants nevertheless made reference to article 6 thereof which requires States to hold perpetrators of enforced disappearances criminally responsible for their actions. It was submitted that the "prosecutorial indemnity" conflicts with the Bill of Rights as interpreted in light of the *Disappearance Convention* in that it provides for the perpetrators of enforced disappearances to escape criminal responsibility.

4.5.4.3 Customary international law

The applicants argued that certain crimes committed during the *apartheid* regime constitute crimes against humanity. Crimes against humanity have been

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288 Concluding Observations on Indonesia, UN. Doc A/57/44 (2002) 22 par. 43.

289 *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, UN Doc CAT/C/29/D/161/2000; *M'Barek v Tunisia* (60/1996), U.N. Doc. CAT/C/23/D/60/1996 (2000) par. 12 and *Blanco Abad v Spain* (59/1996), *UN Doc CAT/C/20/D/59/1996 (1988).*

defined to include widespread or systematic murder, torture, persecution on political, racial, religious or ethnic grounds and forced disappearance of persons.[290]

Crimes such as torture were said to be part of an organised programme of abuse, authorised at the highest levels of the security forces, condoned by the government of the day and directed against non-combatant and civilian opponents of the *apartheid* regime and its policies. It was therefore submitted that such acts could be described as widespread or systematic and accordingly constitute crimes against humanity.[291]

It was further held that a customary international law obligation to prosecute the perpetrators of crimes against humanity has been well established among the community of nations. Reference in this regard was made to the *International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind* which obliges States to prosecute or extradite those alleged to have committed crimes against humanity. General Assembly resolutions were also relied upon which confirm the existence of an obligation to prosecute crimes against humanity.[292]

4.5.4.4 Other forms of international law

United Nations Declarations and Resolutions

The *Declaration on the Protection of all Persons from Enforced Disappearances*[293] (*Declaration on Disappearances*) obliges States to institute legal mechanisms for the prevention and punishment of enforced disappearances. Article 14 states that:

> Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial.

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290 Statute of the ICTY, a 5; Statute of the ICTR, a 3; *Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9)*, a 7; International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, a 18.

291 TRC Report 2003 vol. 6 s 5 ch 2 paras. 16-17; 24-29; 55-57 and vol. 2, ch 3 of the Interim TRC Report 1997.

292 Report of the International Law Commission, 48th session, 1996, submitted to the General Assembly (par. 50); General Assembly Resolution 3074 (XXVIII) entitled Principles of International Co-Operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.

293 Adopted by General Assembly resolution 47/133 of 18 Dec 1992.

Further, article 18 specifically states that:

> Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.

According to the applicants, the "prosecutorial indemnity" constitutes measures similar to an amnesty law which results in the exemption of the perpetrators of enforced disappearances from criminal proceedings. This effect was further said to be contrary to the terms of the *Declaration on Disappearances*.

The *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[294] (*Torture Declaration*) states in article 10 that:

> If an investigation...establishes that an act of torture...appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders...

Consequently it was argued that pursuant to the *Torture Declaration*, the vesting of a discretion to decline to prosecute despite clear evidence of torture is manifestly inconsistent with fundamental aspects of international law.

The *UN Security Council Resolution* 1325[295] which recognises the importance of prosecution for the attainment of both justice and peace was further of specific relevance to the applicants' submission. Here the Security Council emphasised in the preamble that it is:

> ...the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions.

In conclusion it was accentuated that under article 25 of the *UN Charter*

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council.

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294 Adopted by General Assembly resolution 3452 (XXX) of 09 Dec.1975.
295 Adopted by the Security Council at its 4213th meeting on 31 Oct 2000.

The applicants concluded by warning that South Africa should refrain from taking steps which violate this resolution.

Principles and Guidelines

The applicants also referred to a number of resolutions in support of their argument. Firstly, in a resolution passed on 21 April 2005, the UN Commission on Human Rights (UNCHR) adopted[296] the updated *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*[297] (*Impunity Principles*) as a guideline to assist States in developing effective measures for combating impunity.

The UNCHR has been succeeded by the HRC, which is charged with carrying over all the UNCHR's mandates and responsibilities and which assumes the role and responsibilities of the UNCHR relating to the work of the Office of the High Commissioner. Given that South Africa is a member of the HRC, the applicants held that there is a requirement that it abides by resolutions of the HRC.

Principle 19 of the *Impunity Principles* requires that:

> States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished...

In view of the above-mentioned, the applicants argued that the prosecutorial indemnity, which removes the obligation to prosecute those responsible for serious crimes committed during the *apartheid* regime, violate these principles.

Secondly, on 21 March 2006, the UN General-Assembly passed a resolution adopting the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and*

296 Commission on Human Rights, 60th meeting, UN Doc. E/CN.4/2005/L.10/Add.17 (21 Apr 2005).
297 E/CN.4/2005/102 and Add.1.

Serious Violations of International Humanitarian Law[298] (*Right to a Remedy Principles*).

The *Right to a Remedy Principles* confirm that States have an obligation to prosecute perpetrators of human rights violations. Article 11 specifically states that a victim has the right to "equal and effective access to justice".

With respect to the duty to prosecute those responsible for human rights violations, principle 4 of the *Right to a Remedy Principles* states that:

> In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him...

Thirdly, in 2002, the 32nd ordinary session of the African Commission on Human and Peoples' Rights adopted the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*[299] (The *Robben Island Guidelines*).

In terms of the *Robben Island Guidelines*, member States are urged to co-operate with the *UN Human Rights Treaty Bodies*, the *UN Commission on Human Rights* and in particular, the *UN Special Rapporteur on Torture*. The *Robben Island Guidelines* called for the criminalisation of torture and required, *inter alia* that:

> National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5(2) of the UN Convention against Torture.[300] [and that]
>
> Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.[301]

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298 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (16 Dec 2005).

299 ACHPR Res.61 (XXXII) 02.

300 *Robben Island Guidelines* Part 1, par. 6.

301 *Robben Island Guidelines* Part 1, par. 12.

4.5.5 *Regional human rights instruments*

Various regional human rights instruments have been adopted to complement and reinforce universal human rights instruments. The applicants relied on these regional instruments in support of their application and specifically referred to European, American and African human rights instruments.

European Court of Human Rights

Article 13 of the *European Convention on Human Rights* (*European Convention)* provides that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The applicants focused on the duty to conduct a thorough and effective investigation and held that where such an investigation reveals grounds for prosecution, such prosecution would be necessary to satisfy the right to an effective remedy as enshrined in article 13.

The applicants also made reference to a number of *ECHR* cases[302] illustrating the interpretation and application of article 13. In *Aksoy v Turkey*,[303] for example, the victim's father brought a case to the *ECHR* alleging that his son had been tortured and killed by government officials and claiming that he had been denied an effective remedy on the basis that the prosecutor had declined to institute criminal proceedings. The *ECHR* found that the failure to properly investigate the applicant's claim resulted in a violation of article 13.

It was submitted that, in accordance with the approach of the *ECHR* with respect to article 13 of the *European Convention*, the Constitutional Court should find that the constitutional principle of the rule of law requires the availability of a means to enforce the right to life[304]and the right to be free from cruel, inhuman and

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302 *Yasa v Turkey* 28 Eur. H. R. Rep. 408 (1998); *Tanrikulu v Turkey* 1999-X Eur. Ct. H.R. 145; *Kilic v Turkey* 2000-II Eur. Ct. H.R. 119; *Mahmut Kaya v Turkey* 2000-III Eur. Ct. H.R. 149, 162, 184.

303 23 Eur. H.R. Rep. 553 (1997).

304 S 11 of the *Constitution.*

degrading treatment.[305] The "prosecutorial indemnity" was said to essentially remove the guarantee of an effective remedy by granting the prosecutor the discretion to decline to prosecute even in the face of overwhelming evidence.

Inter-American Court of Human Rights (IACHR)

The applicants relied on the jurisprudence of the *IACHR* relevant to issues relating to the duty to prosecute and the legality of amnesties.

Firstly, the case of *Velasquez-Rodriguez*,[306] which involved the government affected forced disappearance of *Velasquez-Rodriguez* in Honduras. The *IACHR* interpreted article 1(1)[307] of the *American Convention on Human Rights* (*American Convention*) in conjunction with article 7[308] to mean that:[309]

> ...a State is obligated to prevent, investigate and punish human rights violations...a State is obligated to investigate every situation involving a violation of the rights protected by the Convention...

The *IACHR* concluded that:[310]

> If the State apparatus acts in such a way that the violation goes unpunished...the State has failed to comply with its duty to ensure the full and free exercise of those rights to the person within its jurisdiction.

Measures to investigate, prosecute and punish serious human rights violations were considered to play an important role in preventing the repetition of similar violations in the future.

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305 S 12(1) of the *Constitution*.
306 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (29 Jul 1988).
307 A 1(1): "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination...".
308 A 7(6): "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful...".
309 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (29 Jul 1988), par. 172 and 176.
310 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (29 Jul 1988), par. 176.

Secondly, the following observation of the *IACHR* in the case of *Paniagua Morales et al* was highlighted:[311]

> ...the State has the obligation to use all the legal means at its disposal to combat [impunity], since impunity fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives.

Thirdly, the applicants relied on the landmark judgment in the *Barrios Altos* case[312] where the *IACHR* determined that the Peruvian Amnesty Laws No. 26479 and No. 26492 were incompatible with the *American Convention* and could not impede the investigation, identification and punishment of persons responsible for violating rights enshrined under the *American Convention*.

Fourthly, in its recent decision on *Moiwana Village v Suriname* the *IACHR* reaffirmed its view as to the incompatibility of amnesties, statutes of limitation and similar measures with the Convention, stating that:[313]

> ...no domestic law or regulation - including amnesty laws and statutes of limitation - may impede the State's compliance with the Court's orders to investigate and punish perpetrators of human rights violations...

Fifthly, it was also noted that the *IACHR* does not restrict its comments to amnesty laws but casts its net widely enough to include laws and other measures which have the same effect.

Finally, in its recent Report on the Demobilization Process in Colombia the *Inter-American Commission on Human Rights* observed the following:[314]

> ...whenever amnesty laws or similar legislative measures render ineffective and meaningless the obligation of the state party to ensure judicial clarification of the facts of crimes of international law, they are incompatible with the American Convention, independent of whether the violations in question may be attributed to state agents or private persons.

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311 1998 Inter-Am. Ct. H.R. (ser. C) No. 37 (08 Mar 1998) par. 173.
312 *Chumbipuma Aguierre v Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (14 Mar 2001).
313 *Moiwana Village v Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) no. 124 par. 167 (15 Jun 2005).
314 Inter-Am. Commission on Hum. Rts., OAS, Report on the Demobilization Process in Colombia, OEA/Ser.L/V/II.120 doc. 60 par. 26.

African Charter on Human and People's Rights

Closer to home, the applicants relied on the *African Charter on Human and People's Rights*[315] (*African Charter*). Article 1 of the *African Charter* requires member states to recognise the rights, duties and freedoms enshrined in part 1 *Rights and Duties* of Chapter 1 *Human and People's Rights* and further requires member states to adopt legislative or other measures to give effect to the said rights and duties. Article 3(h) of the *Constitutive Act of the African Union*[316] (*Constitutive Act*) further requires member states to promote and protect human and people's rights in accordance with the *African Charter* and other relevant human rights instruments.

The applicants specifically referred to articles 4 and 5 of the *African Charter* which respectively preserve the right to life and the right not to be subjected to torture or inhuman treatment. Focus was then placed on articles 4(m) and (o) of the *Constitutive Act* which require member states to uphold human rights and the rule of law and condemn and reject impunity.

4.5.6 Foreign law

Section 39(1)(c) of the *Constitution* determines that a court, tribunal or forum *may* consider foreign law when interpreting the Bill of Rights. The applicants therefore also relied on foreign law with reference to decisions of the highest courts of Chile, Argentina, Peru and Colombia. These courts have all handed down decisions invalidating provisions which provide for impunity on the basis that such provisions conflict with international obligations as established by international instruments and as interpreted by authoritative international courts and other bodies.

In all of these countries, the courts have given domestic effect to international law and based on this, the applicants called on South African courts to follow suit.

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315 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Adopted 27 Jun 1981 entered into force 21 Oct 1986.

316 Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Governments on 11 Jul 2000 at Lomé, Togo, entered into force 26 May 2001.

Supreme Court of Chile

The first Supreme Court ruling on the non-applicability of the Chilean amnesty law to a conviction and sentence was in the *Miguel Angel Sandoval Rodríguez* case.[317] The Court disregarded an amnesty decree covering human rights crimes committed between 1973 and 1978 and upheld the conviction and sentence of a number of people in a case of forced disappearance that occurred in 1975.

As recently as 17 July 2006, the Supreme Court upheld a ruling that stripped General Augusto Pinochet of his immunity, paving the way for him to be tried for the murders of two body guards of Salvador Allende. The ruling affirmed a lower court decision to remove Pinochet's immunity as a former President and allowed the judge handling the case to try him on homicide charges.[318]

Supreme Court of Argentina

On 14 June 2005, in the *Simón* decision,[319] the Supreme Court declared unconstitutional and void two laws of which the object was to render the majority of prosecutions for "Dirty War" crimes (crimes committed between 1976 and 1983) impossible. The Supreme Court confirmed the role of international human rights principles in dealing with egregious human rights abuses committed on national soil and confirmed the precedence of Argentina's treaty obligations above the application of national legal provisions. In practice, the decision opens the way to prosecution of perpetrators of serious human rights abuses after almost two decades of standstill.

Constitutional Court of Peru

The Constitutional Court has established the State's duty to investigate and sanction human rights violations and the inadmissibility of using procedural mechanisms to impede investigation and punishment of serious violations. In the *Villegas Namuche* case, the Court declared that:[320]

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317 *Miguel Angel Sandoval Rodríguez* Juan Contreras Sepúlveda y otros (crimen) casacoin fondo y forma. Corte Suprema, 517/2004. Resolución 22267 (Chile).

318 Eduardo Gallardo, *Chilean Court Pinochet's Loss of Immunity,* Associated Press, July 17, 2006. See International Center for Transitional Justice (ICTJ) Amicus Brief to the Indonesian Constitutional Court 26.

319 Simón, Julio Héctor y otros s/privación ilegítima de la libertad. Supreme Court, causa No. 17.768 (14 Jun 2005) S.1767.XXXVIII.

320 File No. 2488-2002-HC/TC, ruling of 18 Mar 2004.

> ...it is the State's responsibility to try those accused of crimes against humanity, and, if necessary, to adopt restrictive rules to avoid, for example, exemption from prosecution for serious human rights crimes. Applying these rules allows the legal system to work effectively and is justified by the overriding interest in combating impunity. The goal, obviously, is to prevent certain legal mechanisms from being used with the repugnant intent of achieving impunity. This must always be prevented and avoided, since it encourages criminals to repeat offences, acts as a breeding ground for revenge and erodes the fundamental values of democratic society: truth and justice...

Constitutional Court of Colombia

On 18 May 2006, the Constitutional Court handed down a decision[321] confirming the requirement that perpetrators of human rights abuses be prosecuted and that victims of human rights abuses be awarded reparations. The Court struck down several provisions of Law 975/2005 which authorised significant sentence reduction for certain demobilized combatants and did not condition the granting of the sentence reduction benefit on effective contribution to the reparation of victims.

4.6 The court's decision and the effect thereof

The case was not about the validity of prosecutorial discretion as such, but rather about the considerations that can and should be lawfully taken into account when such discretion is exercised. The real issue was whether or not the policy amendments properly reflect the NDPP's intention to comply with its constitutional mandate to prosecute crime and if that was found not to be the case, whether or not the said policy amendments should be allowed to remain in the book.

In interpreting the policy amendments, the court held that the wording should be seen in context. The introduction contained in part A of the policy amendments, sets out the background and context of the policy amendments as well as the build-up to prosecutions in view of which part C of the policy amendments should be interpreted.

Part C, paragraph 3 of the policy amendments determines that if the alleged offence falls within the scope of the policy amendments and if a prosecution can be instituted on the strength of adequate evidence after applying the general criteria in paragraph 4 of the National Prosecuting Policy, further criteria in paragraphs 3(a)-(j)

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321 Case No. C-370/2006, (D-6032) regarding the Law of Justice and Peace, 18 May 2006. See International Center for Transitional Justice (ICTJ) Amicus Brief to the Indonesian Constitutional Court 27.

of the policy amendments must be applied before reaching a decision. The court then highlighted paragraphs 3(d)(iv) and (f) of the policy amendments and found the contents thereof to be strikingly similar to the factors contained in section 20 of the *PNURA*, namely

> (d) (iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;
>
> (f) the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

The court analysed the relevant provisions of the policy amendments which were said to be in contrast to this intention and regarded the criteria in part C, paragraph 3 of the policy amendments as irrelevant in deciding whether or not to prosecute. In fact, paragraph 2 of the policy amendments, read together with paragraph 3 of the policy amendments, was said to allow the NDPP not to prosecute even where there is a strong case and adequate evidence which is tantamount to what is intended by the applicants as "prosecutorial indemnity" which is directly opposite to the NDPP's constitutional obligation to prosecute crime. The policy amendments were consequently declared inconsistent with the *Constitution* and therefore unlawful and invalid. The court stopped there and did not elaborate on the applicants' other legal challenges. It was further held that the National Prosecuting Policy, as it was prior to its amendment, has to govern the prosecuting process.

The message that came across very strongly in the judgment was that the *strength of adequate evidence* should be the determining factor in the NDPP's decision whether or not to prosecute:[322]

> What else is required for the purpose of taking a decision to prosecute or not to prosecute in the face of the strength of adequate evidence?

The court even went as far as to say that the NDPP *must* comply with its *obligation* to prosecute where there is sufficient evidence to do so and that by refusing it would act unconstitutional:[323]

322 Judgment par. 15.4.3 (emphasis added).
323 Judgment par. 15.4.3 (emphasis added).

> When there is sufficient evidence to prosecute, the first respondent must comply with its obligation. Entitlement by the first respondent, to refuse to prosecute where there is sufficient evidence to do so, would in my view be unconstitutional.

From this it is clear that the court placed strong emphasis on mandatory prosecutions by holding that all provable cases should be prosecuted without placing sufficient emphasis on the balanced use of the criteria in paragraph 4 of the National Prosecuting Policy, let alone annexure A, part C of the policy amendments.

Mention was, however, made of the "public interest" consideration as envisaged in paragraph 4 of the National Prosecuting Policy, which determines the following:

> Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.
>
> There is no rule in law, which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

Relevant factors such as the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender should be considered in determining "public interest".

5 Conclusion

Although the TRC completed its work in 1998 and the Amnesty Committee its in 2003, the process of transformation, reconciliation, development and reconstruction of the South African society was, however, not finalised. "Post-TRC prosecutions" is another phase in this ongoing process, addressing "unfinished business" after the TRC has completed its work.

It should be borne in mind that the prosecutions in question directly relate to the crimes committed during the relevant period under scrutiny by the TRC. The similarities between the criteria in part C of the policy amendments and those in section 20 of the *PNURA*, as pointed out in paragraph 4.2 of this Chapter above, are therefore not surprising. Essentially an amnesty process through a forum such as

the TRC is not similar to a prosecuting process through a prosecuting authority, but both processes should work towards a common goal and that is to contribute (not undermine) the national project of transformation, reconciliation, development and the reconstruction of society.

Strikingly and certainly a point of critique is the fact that the policy amendments were only finalised at such a late stage. The reasons given for the delay, as pointed out in paragraph 1 above, are not acceptable. As was seen in Chapter 2 of this book above, the concept of amnesty makes no sense unless it is linked to the credible alternative that unsuccessful or unco-operative candidates will face prosecutions.[324] Both these processes should have been dealt with collectively during the negotiations that brought about the peaceful settlement of South Africa's political crisis. Prosecutions were envisaged by both the State and the TRC and confirmed in the *PNURA*[325] and by the court in the *AZAPO* judgment,[326] but why it was only finalised at the last-minute is hard to grasp. Surely the NPA was able to foresee the difficulties in prosecuting these crimes. They, Government included, should have prepared and proposed a strategic plan that could have prevented the controversy surrounding the National Prosecuting Policy and its amendment. As will be seen in Chapter 5 of this book below, the more time it takes to finalise the matter, the more it brings about uncertainty and despair which impacts negatively on the victims and their families.

Post-TRC prosecutions in terms of the policy amendments have undoubtedly opened a hornet's nest and, as seen above, various concerns regarding its formulation, interpretation and application, whether or not justified, exist and will continue to evolve.

The main concern raised by the applicants in the *Nkadimeng*-challenge and with which the court agreed, is that a decision to decline a prosecution, based on the additional criteria introduced by part C of the policy amendments, would amount to a "prosecutorial indemnity" and ultimately result in a re-run of the TRC. The court

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324 Bennun ME "Some procedural issues relating to Post-TRC prosecutions of human rights offenders" 2003 *SACJ* 18-19.

325 S. 21 of the *PNURA*.

326 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC) par. 17. See Bennun ME "Some procedural issues relating to Post-TRC prosecutions of human rights offenders" 2003 *SACJ* 17-18. See Applicant's Heads of Argument par. 7.6.

therefore granted the applicants their first prayer by declaring the policy amendments invalid and inconsistent with the *Constitution*. Considerations such as the degree of remorse shown by the alleged offender, his or her attitude towards reconciliation, the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society, were found to be irrelevant.

As seen above,[327] mention was made of the "public interest" consideration in paragraph 4 of the National Prosecuting Policy. The question is whether or not "public interest" can also be interpreted and understood to include the above-mentioned considerations which were found to be irrelevant. It is submitted that it does. Understandably, the court was concerned about the similarities between the criteria in part C of the policy amendments and those in section 20 of the *PNURA*, but to think that by declaring the policy amendments invalid the risk of these considerations playing a role in decisions whether or not to prosecute, is short-sighted. Arguably the discretion in terms of the National Prosecuting Policy, in particular paragraph 4 allows for these considerations to play a role in determining "public interest".

The legal challenges were, apart from the administrative law challenge, relatively straight forward. As observed in paragraph 4.5.4 of this Chapter above, it seems that the applicants focussed more on the amnesty debate in public international law and almost using this application as an opportunity to rebut the Constitutional Court's argument in the *AZAPO* case. With regard to the administrative law challenge, it became clear from the analysis in paragraph 4.5.3 of this Chapter above that the applicants' argument was fundamentally flawed in that the adoption of the policy amendments does not constitute administrative action. Consequently their challenge based on this incorrect assumption is without merit. Had the court not agreed to grant them their initial prayer, their second prayer would not have succeeded.

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327 See par. 4.6 of this Ch.

CHAPTER 4

SUBSTANTIAL AND PROCEDURAL ISSUES RELATING TO POST-TRC PROSECUTIONS AND APPROPRIATE SENTENCING

1 Introduction

In this chapter, the submissions made by the CSVR will be analysed and evaluated, and where possible, the framework it proposes will be supplemented. The aim of this chapter is to encapsulate and address the issues that restrain progress and to suggest possible solutions thereto.

The first part of this Chapter will be devoted to substantial and procedural issues relating to post-TRC prosecutions. At the outset, the crimes in question will be identified where after the "classes" of offenders that should be investigated and possibly prosecuted will be determined. Related hereto is the form of criminal liability that needs to be established in order to hold these offenders responsible for the crimes they have allegedly committed. Once that much is clear, various obstacles in the way of successful prosecutions, which include organisational, financial and evidentiary constraints, will be emphasised.

In an attempt to alleviate evidential constraints in the context of the prosecution of political crimes committed in the *apartheid* past more than three decades ago, reference will firstly be made to the *Rules of Procedure and Evidence* of the ICTY which is a specialised tribunal also dealing with crimes committed in the past. Despite distinct differences between the position in South Africa and the ICTY, the applicability of certain provisions of its *Rules of Procedure and Evidence* in post-TRC prosecutions will be explored.

Secondly, the proposition that the proceedings and findings of the Amnesty Committee may possibly be used as admissible evidence amounting to *prima facie* proof by the prosecution in subsequent criminal trials will be particularly emphasised. Finally, standard arrangements in the normal execution of justice and the prosecuting mandate, which are accommodated in existing legislation, will be explored. These arrangements include plea and sentence agreements, and indemnity agreements on the basis of incriminating evidence by witnesses for the prosecution.

In the second part of this Chapter, appropriate sentencing approaches will be explored with restorative justice as underlying philosophy. Specific reference will be made to the possible introduction of customary law principles into the formal criminal justice system by way of a supple restorative justice approach. The aim is to explore the possible extension of recent judicial recognition of the afore-mentioned to post-TRC prosecutions and ultimately to suggest a framework that best suits the specific and sensitive context of these prosecutions, which could positively contribute to this phase in South Africa's transformation by complementing the legacy of the TRC.

2 Crimes in question

The crimes under scrutiny by the TRC are encapsulated in section 1(1) of the *PNURA* and as seen above, the TRC was concerned with "gross violations of human rights" which are defined by the afore-mentioned section as follows:

> ...
>
> (a) the killing, abduction, torture or severe ill-treatment of any person; or
>
> (b) any attempt, conspiracy, incitement, instigation, command, or procurement to commit an act referred to in paragraph (a),
>
> which emanated from conflicts of the past and which was committed during the period 1 March to the cut-off date within or outside the Republic, and the commission of which was carried out, advised, planned, directed, commanded or ordered, by any person acting with a political motive;

Because many of these crimes were committed more than three decades ago, it can have implications for the institution of prosecutions. One such implication is the prescription of the right to institute a prosecution contemplated in section 18 of the *Criminal Procedure Act* 51 of 1977 (*CPA*) which determines that:

> The right to institute a prosecution for any offence, other than the offences of—
>
> a) murder;
> b) treason committed when the Republic is in a state of war;
> c) robbery, if aggravating circumstances were present;
> d) kidnapping;
> e) child-stealing;
> f) rape; or

g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002.

[Para. (*g*) added by s. 39 of Act No. 27 of 2002.]

shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

In brief, the crimes listed in the above-mentioned section are not subject to prescription. The policy amendments[328] in Part A, paragraph 2(c) also refer to prescription and specific mention is made of the non-prescription of the crime of murder.[329] Although the policy amendments have been repealed, the crime of murder will surely still be prioritised due to the non-prescription and the egregious nature thereof.

Although South Africa has ratified the *Torture Convention*, the crime of torture has not yet been incorporated into South African law. According to Fernandez, no South African court would, even if torture is now part of international customary law, claim jurisdiction to try a case of torture for as long as the crime is not enacted into national law.[330] Torture is, however, prosecuted as assault or assault causing grievous bodily harm.[331] As such, it is not excluded from the ambit of section 18 of the *CPA* which means that the NPA is precluded from prosecuting any acts of torture that were committed more than 20 years ago. The effect hereof is that incidents of torture that resulted from a climax in violence during the mid to late 1980's can no longer be prosecuted.[332]

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328 The National Prosecuting Policy relating to Post-TRC prosecutions. See Ch. 3 of this book above.

329 See par. 3.1 Ch. 3 of this book above with reference to Part A, par. 2(c) of the policy amendments.

330 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 80.

331 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 197.

332 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 197.

Bubenzer investigates the possibility of excluding the application of the statute of limitation in section 18 of the *CPA* under international law as well as ways to neutralise such under constitutional law.[333] Based on the supposition that acts of torture committed during the *apartheid* era constitute "crimes against humanity", he in the first leg of his investigation considers, amongst others, the *Rome Statute*, the *UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* of 16 November 1968, as well as customary international law. He concludes that due to the non-applicability of the afore-mentioned sources of international law in the context of post-TRC prosecutions, it cannot be relied on in support of the view that international law demands the exclusion of the application of the statute of limitation to acts of torture committed during the *apartheid* era.

With regard to the second leg of his investigation, Bubenzer supports the view that compelling constitutional implications require an interpretation of the statute of limitation in section 18 of the *CPA* to the effect that the limitation period be regarded as interrupted during the *apartheid* era when "security forces were virtually never prosecuted and operatives were protected by a system and policy of non-prosecution."[334] This is founded on South Africa's present constitutional order which places a high premium on the values of human rights and the rule of law.

3 "*Classes*" of offenders of "*gross human rights violations*" that should be investigated and possibly prosecuted

The following "classes" of offenders have been identified in the *CSVR's Alternative Prosecution Policy Framework*:[335]

a) Persons who did not qualify for amnesty at the TRC;
b) Persons who publicly advised the TRC that they would not abide by its jurisdiction and for whom available evidence against them amounts to a *prima facie* proof of guilt;

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333 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 197-201.
334 Koppe K *Wiedergutmachung für die Opfer von Menschenrechtsverletzungen in Südafrika* (Berliner Wissenschafts-Verlag 2005) 26. See Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 200.
335 *CSVR's Alternative Prosecution Policy Framework* par. 3.

c) Persons whose names arose in TRC proceedings as committing crimes, who did not apply for amnesty, and for whom the TRC evidence amounted to a *prima facie* proof of guilt;[336]

d) Persons who have been identified by third parties in "plea and sentence agreements"[337] and/or "indemnity agreements"[338] and for whom the evidence against them amounts to a *prima facie* proof of guilt; and

e) Persons who have been identified by the National Intelligence Agency, the NPA and/or the SAPS and for whom the evidence against them amounts to a *prima facie* proof of guilt.

In addition, it has also been noted that individual victims or offenders may approach the NPA with information and requests for investigations regarding currently unidentifiable or identifiable perpetrators; that the Independent Complaints Directorate may find that the absence of a police investigation or an incomplete police investigation was/is improper and direct that an appropriate investigation should occur, which may lead to the identification of a perpetrator; and that members of Parliament and political parties may bring constituency concerns involving past political violence to the Houses of Parliament and its committees.

Another aspect relevant in determining "classes" of offenders is immunity. The question is whether or not state officials, former and serving, who allegedly committed *apartheid* era crimes, are entitled to immunity from criminal liability. The answer to this question lies in the contemporary international law approach to immunity which no longer accepts that a state may treat its nationals as it pleases. Apart from conventions and custom that prescribe a wide range of human rights obligations with which states must comply, some human rights norms enjoy such a high status that their violation, even by state officials, constitute international crimes.[339] Due to the afore-mentioned, it can be argued that the doctrine of immunity is not absolute and that it is doubtful whether state officials who committed

336 See par. 4.2.3 of this Ch. below.
337 See par. 4.2.4 of this Ch. below.
338 See par. 4.2.5 of this Ch. below.
339 Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 249-250.

human rights violations in the *apartheid* era will be able to rely on thereon to escape criminal liability.[340]

In relation to "classes" of offenders, the legal effects of amnesty with reference to section 20(7) of the *PNURA* also becomes relevant. This section determines that no person who has been granted amnesty in respect of an act, omission or offence shall, in terms of section 20(7) of the *PNURA*, be criminally or civilly liable in respect of such act, omission or offence.[341] Pertaining to the scope and effect of this provision, the "vicarious liability" of any person for such an act, omission or offence is excluded. Vicarious liability is imposed on a "master" for the wrongful conduct of a "servant" who is acting as such and in the course and scope of the latter's employment.[342] Section 20(7)(b), however, determines that an amnesty granted to any person shall have no influence upon the criminal liability of any other person contingent upon the liability of the person who has been granted amnesty. The aim of this provision is that where two people are linked in some way recognised by the criminal law, the granting of an amnesty to one person will not frustrate criminal proceedings against another person whose liability is contingent on the liability of the person who has been granted amnesty.[343] Three categories have been identified for this purpose, namely:[344]

a) those who qualify as secondary parties and co-principal offenders;
b) those who aided, abetted, counselled or procured the amnestied conduct of others; and
c) those whose liability arises out of the doctrines of incitement, conspiracy or attempt.

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340 Dugard J *International Law: A South African Perspective* 3rd ed (Juta Lansdowne 2005) 249-250.
341 See also par. 4.2.1 Ch. 2 above.
342 "In general, this type of liability is exclusively civil and thus it applies only to delicts; accordingly, only if it is imposed by statute does it extend to criminal liability." See Bennun ME "Some procedural issues relating to post-TRC prosecutions of human rights offenders" 2003 *SACJ* 20 fn 12.
343 See Bennun ME "Some procedural issues relating to post-TRC prosecutions of human rights offenders" 2003 *SACJ* 20.
344 See Bennun ME "Some procedural issues relating to post-TRC prosecutions of human rights offenders" 2003 *SACJ* 20.

Among these "classes" of offenders, it has been suggested that a prioritising strategy be followed.[345] The rank of authority of the perpetrator and the egregiousness of the crime in question are proposed as criteria that should govern the decision whether or not to focus on a specific case. Firstly and with regard to the rank of authority of the perpetrator, a distinction has to be made between perpetrators with a low rank of authority (junior perpetrators/subordinates) who are those who acted on the basis of specific instructions whereas perpetrators with a high rank of authority (senior perpetrators/superiors) are those who acted in a position of great influence, authority or leadership, thus in a position of high responsibility. The *CSVR's Alternative Prosecution Policy Framework* notes that the definition of a "superior" is not limited to military superiors and that it may extend to *de jure* or *de facto* civilian superiors. Furthermore, it is emphasised that a superior-subordinate relationship requires that it be found beyond a reasonable doubt that the accused was able to exercise effective control over his or her subordinates. Under the effective control test, superiors, whether military or civilian, must have the material ability to prevent or punish criminal conduct.

However, the South African legal system does not know the concept of a show trial where political leaders and policy makers, and not the foot soldiers, are answerable for the grave human rights violations of a criminal nature.[346] In South Africa, criminal liability attaches to the person, based on the common law individual criminal conduct of the accused. To place a former *apartheid* Minister of Police on trial, for example, the prosecution will consequently have to prove that the Minister himself perpetrated or ordered the crime or acted in common purpose in committing the crime. This will, according to some, be extremely hard to prove.[347] From this view it follows that *apartheid* era crimes cannot be prosecuted under a special statute and that the common law route rather has to be followed.

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345 Varney H "Exploring a Prosecutions Strategy in the Aftermath of South Africa's Truth and Reconciliation Commission" (Unpublished paper presented at the Foundation for Human Rights and International Centre for Transitional Justice Conference on Domestic Prosecutions and Transitional Justice May 16-19 2005 Magaliesberg). See Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 203.

346 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 80.

347 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 80.

Secondly and pertaining to the egregiousness of the crime, a similar proportionality test to that which the Amnesty Committee used in determining whether or not a particular act, omission or offence was associated with a political objective, is proposed. Along the lines of the relevant section in the *PNURA*, namely section 20(3)(f), an offence should be regarded egregious if it is out of proportion with the political objective pursued. Three categories of priority have subsequently been identified and can be summarised as follows:[348]

TABLE III

	LOW Priority	**MIDDLE Priority**	**HIGH Priority**
LOW Rank/Authority	Non-egregious offences and egregious offences with mitigating circumstances	Egregious offences	
MIDDLE Rank/Authority	Non-egregious offences	Egregious offences	
HIGH Rank/Authority	Non-egregious offences	Non-egregious offences with aggravating circumstances	Egregious offences and egregious offences with aggravating circumstances

Varney suggests that high priority cases should be prosecuted; that middle priority cases should only be prosecuted when there are practical demands to do so or when resources allow it; and that low priority cases should not be prosecuted at

348 Varney H "Exploring a Prosecutions Strategy in the Aftermath of South Africa's Truth and Reconciliation Commission" (Unpublished paper presented at the Foundation for Human Rights and International Centre for Transitional Justice Conference on Domestic Prosecutions and Transitional Justice May 16-19 2005 Magaliesberg). See Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 204.

all.[349] Similar to the sentiments of the ICTR and ICTY and the ICC on this matter, the *CSVR* also supports the view that superiors who are most responsible should be prioritised.[350]

It is argued here that the suggestion made by *Varney* that low priority cases should not be prosecuted at all leaves no room for practical considerations concerning strategy. In some cases involving different levels of command, it is often advisable to prosecute operatives first in order to be able to establish a solid case against their superiors.[351] It therefore follows that a more practical and realistic approach should be followed.

A further priority proposed by the CSVR is that state actors should be pursued over liberation movement actors. This approach is in line with the view of the TRC that liberation movement actors occupy the moral high ground, but should also be qualified for those who hold the moral high ground do not have *carte blanche* as to the methods they use.[352] According to the CSVR, it is reasonable to differentiate between these actors and necessary to prioritise state actors because cases that involve the former executive, police and military branches are likely be more expensive and resource intensive than dealing with individual gross violations of human rights. More specifically, it is held that proving complicity and actions of state officials involves a review of complex state processes and institutions rather than simply proving individual criminal responsibility and culpability. The CSVR finds support for this view in the fact that *apartheid* is declared a crime against humanity and therefore they hold that planners and senior facilitators should be investigated and prosecuted in advance of liberation actors who were combating this internationally condemned state policy. As indicated above,[353] post-TRC

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349 Varney H "Exploring a Prosecutions Strategy in the Aftermath of South Africa's Truth and Reconciliation Commission" (Unpublished paper presented at the Foundation for Human Rights and International Centre for Transitional Justice Conference on Domestic Prosecutions and Transitional Justice May 16-19 2005 Magaliesberg). See Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 204.

350 *CSVR's Alternative Prosecution Policy Framework* par. 6(v).

351 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 202.

352 See par. 5.2.1 Ch. 2 of this book above as well as Varney H "Exploring a Prosecutions Strategy in the Aftermath of South Africa's Truth and Reconciliation Commission" (Unpublished paper presented at the Foundation for Human Rights and International Centre for Transitional Justice Conference on Domestic Prosecutions and Transitional Justice May 16-19 2005 Magaliesberg). See Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 205.

353 See par. 3.1.1 Ch. 2 and par. 4.5.4 Ch. 3 of this book.

prosecutions do not concern *apartheid* as international crime and for this reason it is not clear why the CSVR relies thereon.

Prioritising state actors over liberation movement actors also gives rise to the controversial issue, namely that of even-handedness.[354] It was warned that if the NPA does not act in a scrupulously even-handed manner, it would be difficult to avoid the perception that the trials that could ensue would be political trials.[355] The request for even-handedness is based on the equality provisions in the *Constitution* and equality legislation giving effect to these provisions. Section 9(1) of the *Constitution* determines that everyone in equal before the law and has the right to equal protection and benefit of the law. Section 9(3) of the *Constitution* further prohibits unfair discrimination on various specified grounds. The question, however, is whether or not these rights can be limited in terms of the limitations clause in the *Constitution*, namely section 36 which requires a two-stage process of analysis. Firstly, it has to be determined whether the relevant right in the Bill of Rights has been infringed and secondly, it is required to show that the infringement is a justifiable limitation of that right. It is difficult to apply the usual two-stage analysis of a right and its limitation in the case of equality because section 9 is qualified by the same or similar criteria to those used to adjudicate the legitimacy of a limitation of rights in section 36.[356] It suffices to say that section 9(3) only prohibits discrimination that is unfair and therefore not justified on reasonable grounds.

According to Bubenzer, there are reasonable grounds for differentiation in the context of post-TRC prosecutions and he holds that the request for even-handedness is not of perceptible legal merit and must be considered merely political.[357] He bases his argument on both constitutional and international law. With regard to constitutional law, he argues that based on section 1 of the *Constitution* which outlines the values the South African State is founded on, the crimes committed by the state security forces to enforce and maintain the policy of *apartheid* cannot be equated with acts committed in a violent liberation struggle in order to

354 See also par. 3.1 Ch. 3 of this book with specific reference to part A paragraph 5 of the policy amendments.

355 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 24-26.

356 Currie I and De Waal J *The Bill of Rights Handbook* 5th ed (Juta Lansdowne 2005) 237-238.

357 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 207.

establish these very constitutional values.[358] Pertaining to the liberation struggle, it seems at first glance that the afore-mentioned approach supports "the ends justify the means" principle, but it is, however, acknowledged that criminal liability on the side of the liberation movement members is also possible in cases where, for example, civilians had fallen victim to the landmine campaigns by the ANC.[359]

With regard to international law, Bubenzer differentiates between crimes committed by the security forces and those committed by liberation movements.[360] He argues that crimes committed by the security forces, such as the systematic, large-scale and widespread use of torture, extra-judicial killings and kidnapping of opposition activists are international crimes for which an international duty to prosecute does exist. In contrast hereto he argues that the crimes committed by liberation movements are not crimes under international law or crimes against humanity because they were not orchestrated by state organs or on behalf of a state and above all, the liberation movements are held to have conducted a lawful and legitimate struggle.[361] Based on this differentiation, Bubenzer holds that it is reasonable to prioritise the prosecution of the *apartheid* state forces in order to fulfil international law obligations in this regard. As pointed out above,[362] the question whether or not an international duty to prosecute does exist for the outlined crimes committed by the *apartheid* state forces have not been answered with certainty. This leg of Bubenzer's argument stands and falls on this point, and clearly, if there is no international duty on South Africa to prosecute these crimes based on international law applicable at the time, as some argue,[363] this cannot be used as justification for the differentiation.

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358 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 206.
359 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 206.
360 Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 206.
361 Rwelamira MR "Punishing past human rights violations: Considerations in the South African context" in Rwelamira MR and Werle G (eds) *Confronting Past Injustices, Approaches to amnesty, punishment, reparation and restitution in South Africa and Germany* (Butterworths Durban 1996) 16. See Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 206.
362 See par. 3 Ch. 2 of this book.
363 Du-Bois Pedain A *Transitional Amnesty in South Africa* (Cambridge University Press Cambridge 2007) 328. See par. 3.2 Ch. 2 of this book.

In answer to the request for even-handedness, the NPA followed a more practical approach and emphasised that the most important consideration regarding the decision whether or not to prosecute is the availability of sufficient evidence and the fact that it cannot always be ensured that such evidence will be even-handed.[364]

Another priority explored by the CSVR is "immediacy" and in terms thereof factors such as advanced age and in ill-health of victims, witnesses and perpetrators are highlighted.[365] Consequently, victims and perpetrators are dying before perpetrators can be held accountable and therefore victims are denied justice. Relating to witnesses, there are evidentiary constraints[366] such as availability due to death or reliability due to memory loss. With regard to advanced age and in ill-health of perpetrators, it is, however, pointed out that these factors should only be considered in mitigation of sentencing, and that it should not be a factor in deciding whether or not to prosecute.[367]

4 Obstacles in the way of successful prosecutions

In Chapter 2 of this book it became evident that the lack of political will to prosecute *apartheid* era crimes is regarded as the key reason for the Government's "dismissive attitude" towards post-TRC prosecutions.[368] A distinction has to be drawn between the situation where there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution and political considerations then obstruct prosecution and the situation where there simply is not sufficient evidence irrespective of the lack of political will. In this regard, as highlighted above,[369] various constraints including organisational, financial and evidentiary constraints impact on the feasibility and success of prosecutions which will be examined in greater detail below with the view of exploring possible solutions.

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364 Pretorius T in Villa-Vicencio C and Du Toit F (ed) *Truth and Reconciliation in South Africa: 10 years on* (David Philip 2006) 23-24.
365 *CSVR's Alternative Prosecution Policy Framework* par. 6(ii).
366 See par. 4.2 of this Ch. 4.
367 *CSVR's Alternative Prosecution Policy Framework* par. 6(ii)(b).
368 See par. 5.2.1 Ch. 2 of this book.
369 See par. 5.2.2 Ch. 2 of this book.

4.1 Organisational and financial constraints of the NPA

4.1.1 Organisational constraints

As mentioned above,[370] the PCLU of the NPA, pursuant to Presidential Proclamation and the *National Prosecuting Act* 32 of 1998 (*NPA Act*), has been mandated to manage and direct the investigation and prosecution of "crimes determined by the NDPP", which by way of an NDPP Directive, include "prosecutions of persons who were refused, or failed to apply for, amnesty in terms of the TRC processes."[371]

Recently, the NPA confirmed that the PCLU's workload is "straining its present capacity to the hilt" and "it is clearly evident that the PCLU needs to create new prosecutorial, research and support posts, and be allocated larger premises and operational equipment, to continue to professionally handle its usually high profile responsibilities."[372] With regard to personnel, the *2004/05 and 2005/06 Annual Reports of the NPA* confirmed that until mid-2004 the PCLU only had one special director and two deputy directors. By late 2004 a senior state advocate was allocated and a contract worker was retained to perform all of the PCLU's administrative functions. Furthermore, in 2006, two senior state advocates were seconded to the PCLU. The *Parliamentary Justice Committee* confirmed that as of 3 May 2007, the professional staff of the PCLU was "around six advocates" who, in addition to TRC matters, had to also coordinate prosecution cases involving nuclear non proliferation, chemical and biological non proliferation and mercenary activities. The situation has since then not changed for the better and the lack of an adequate number of well-practised and skilled prosecutors with in-house expertise to deal with such old matters clearly is a stumbling block in the way of successful prosecutions.[373]

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370 See par. 1 Ch. 1 of this book.
371 *2004/05 Annual Report of the NPA* 63
372 *2006/07 Annual Report of the NPA* 43.
373 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 77.

4.1.2 Financial constraints

The above-mentioned organisational constraints can be attributed to very limited financial means allocated to the PCLU. Undoubtedly the Government did not make sufficient provision in its budget for these prosecutions and this is clearly the result of it not enjoying priority. The CSVR confirms that the Government does not have a public "strategic plan" and significant dedicated resources to deal with prosecutions for past political violence for current, identifiable cases with sufficient prima facie evidence that could result in convictions.[374] The *NPA Strategy 2020* does, for example, not mention post-TRC prosecutions as a departmental obligation or action in need of medium to long-term planning.

It has also been observed that financial considerations are hardly mentioned in official statements on post-TRC prosecutions.[375] Despite this, it is argued that financial considerations do weigh heavily with the NPA in deciding whether or not to take a specific matter to trial.[376] This is especially so since most accused would be entitled to state-funded legal aid given the fact that they would have invariably committed crimes in their capacity as functionaries of the *apartheid* state.[377] This, for example, was the case in the trials of Wouter Basson,[378] Magnus Malan and Eugene de Kock,[379] and the high cost of running these trials which took years to conclude, will arguably impact on the State's willingness to prosecute similar cases in future.[380] This consideration has been sharply criticised in comparison with the principle of legality (mandatory prosecution) as in the case of Germany.

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374 *CSVR's Alternative Prosecution Policy Framework* par. 2(ii)(a).

375 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 78.

376 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 78.

377 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 78.

378 For a summary of this case, see Bubenzer O *Post-TRC Prosecutions in South Africa* (Martinus Nijhoff Leiden 2009) 33-51.

379 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 78.

380 Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* 378.

The South African prosecution system is based on the principle of expediency, which means that even if a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, the NPA has the discretionary authority to decline prosecutions under certain circumstances.[381] There is no rule in law which states that all the provable cases brought to the attention of the NPA have to be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the NPA and on a society interested in the fair administration of justice. It is therefore acknowledged that due to the high crime rate and the lack of adequate means and resources, mandatory prosecutions will not be possible in South Africa.

Furthermore, and with specific reference to post-TRC prosecutions, the concern is expressed that mandatory prosecutions might result in the re-opening of partially healing wounds and the rekindling of bitterness – exactly the kind of emotion the TRC was conceived to water down. This view, however, leaves room for considerations other than sufficient evidence which was declared unconstitutional and invalid by the court in the *Nkadimeng*-challenge as discussed above.[382]

In supplementing the PCLU's budget, the Criminal Assets Recovery Account (CARA), which is a fund administered by the NPA and which contains all money and property forfeited to the State as a result of proceeds or instrumentalities of crime, pursuant to the *Prevention of Organized Crime Act* 121 of 1998, partially subsidises the PCLU's TRC missing persons' investigations.[383] CARA can also take requests to assist the PCLU with prosecutions and/or Non Governmental Organisation (NGO) work surrounding this issue.

The Presidents Fund, an account administered by the Department of Justice to assist with TRC victim and community reparations and memorialisations, could also be used to assist with financial disbursements for "victim/witness prosecutorial assistance", "victim-lead investigations" and "victim private prosecutions". Previously, "regulations have been drafted and submitted to the executive authority

381 One such circumstance has been held to be where victims do not desire prosecution because they fear re-traumatisation. See Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 78 and McGregor L "Individual Accountability in South Africa: Cultural Optimum or Political Façade?" 2001 *American Journal of International Law* 36.

382 See par. 4 Ch 3 of this book.

383 2006/07 *Annual Report of the NPA* 60.

for approval for the payment of travel and subsistence allowances to a limited number of persons appointed by the family of the victim to be present at the exhumation[s]."[384]

4.2 Evidentiary constraints

One of the severest problems confronting the NPA is the availability and reliability of evidence.[385] The following part will form the focus of this Chapter and various issues that have a direct effect on the afore-mentioned problems the NPA faces will be investigated.

As seen in the preceding part of this Chapter, the organisational and financial constraints of the NPA hamper it to function properly which in turn also brings along evidentiary constraints. The NPA does not rely on its own means and resources only, but also on that of other institutions such as the SAPS and the Hawks. A good relationship and cooperation between these institutions are therefore vital and in this part, possible reasons why they do not function together properly and the effect it has on post-TRC prosecutions will firstly be explored.

The fact that many *apartheid* era crimes have been committed more than three decades ago further amplifies evidentiary constraints and in this regard reference will be made to the availability and reliability of witnesses and evidentiary material with specific reference to the *Rules of Procedure and Evidence* of the ICTY. In an attempt to alleviate the lack of evidence brought along by the above-mentioned constraints, various attempts have been suggested that will secondly be analysed and evaluated below. These include an overly optimistic interpretation of section 31(3) of the *PNURA* which prohibits the use of TRC evidence in subsequent trials, plea and sentence agreements, and indemnity agreements.

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384 2006/07 *Annual Report of the President's Fund* 4.

385 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 77. See also par. 5.2.2 in Ch. 2 of this book above.

4.2.1 The relationship and cooperation between the NPA, SAPS and the Hawks

In South Africa, the NPA relies heavily on the SAPS for the investigation of crime. The decisions the NPA make and the strength of its cases depend to a great extent on the evidence the SAPS place before the prosecutors. This is a direct consequence of an accusatorial system of criminal procedure. In contrast hereto, the police in Germany investigate cases under the watchful eye of prosecutors.[386] In so doing, police are guided and know exactly what prosecutors need and can allocate their time and resources to effectively contribute to the criminal justice system.

The relationship and cooperation between the SAPS and the NPA has been described as troubling with specific reference to post-TRC prosecutions. It is alleged that officials within the SAPS exploit their investigative powers to frustrate attempts to prosecute their former colleagues accused of human rights abuses.[387] In 2003, for example, the NPA met with the divisional head of the detective services of the SAPS and apparently Commissioner De Beer advised the PCLU that the SAPS would not assist them without the express written instruction of the President in various high profile cases.[388] What the motivation behind this statement was, is not clear. Another case that illustrates the tension between the SAPS and the NPA is that of the 37 prominent ANC members mentioned earlier[389] who have not yet faced charges for civilian deaths during the *apartheid* era. In response to the SAPS and former ex-generals calling for the prosecution of these ANC members based on evidence they allegedly have against these 37 ANC members, the NPA said that it had found no basis for prosecutions against the group.

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386 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 77.

387 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 74.

388 These cases include the Pebco Three, Cradock Four, the Motherwell Bombing, the Cosas Four, the murders of Brian Ngulunga, Ntombi Khubekha and Victoria Mxenge. See Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 74-75.

389 See par. 5.2.1 Ch. 2 of this book.

Apart from the tension between the SAPS and the NPA, the SAPS' own organisational and financial constraints also directly affect the PCLU. Up until 6 July 2009 the PCLU also utilised the NPA's Directorate of Special Operations (the Scorpions). The Scorpions existed as a specialised unit within the NPA established to deal with national priority crimes. The Scorpions' mandate, jurisdiction and institutional placement in the NPA were, however, reviewed and on 6 July 2009, South Africa's new Directorate for Priority Crime Investigation (DPCI), which now falls under the SAPS to be known as the Hawks, was officially launched and replaced the Scorpions.

The reason for the review and ultimate transition was supposedly to expand and improve the specialised investigative capacity of the Scorpions which in theory sounds like a step in the right direction. In practice, however, especially in view of the afore-mentioned tension between the SAPS and the NPA and the fact that the Hawks fall under the SAPS, the question is whether the transition will be beneficial or detrimental to post-TRC prosecutions.

4.2.2 Availability and reliability of witnesses and evidentiary material

As mentioned above, many *apartheid* era crimes were committed more than three decades ago and as a direct consequence of the substatial lapse of time between the commission of these crimes, their investigation and eventual prosecution, many of the victims, witnesses or perpetrators have subsequently died or cannot be traced. Besides this, the passage of time leaves further gaps in the chain of evidence in that the memories of witnesses who are available have faded, dockets and exhibits have disappeared or have deliberately been destroyed by the perpetrators and their accomplices.[390] These concerns and the effect it has on post-TRC prosecutions will be addressed in more detail below.

Another challenge is the difficulty of overturning or reversing the findings of earlier inquests, trials and commissions of enquiry, despite grounded suspicions of the incorrectness of such findings. Added to this are the constraints posed by

390 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par. 17. See Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) 77.

section 31 of the *PNURA* which determines that testimony given at the TRC hearing is inadmissible in later criminal trials.

4.2.2.1 Witnesses

With regard to the prosecution of crimes committed in the past and the unique challenges a substantial lapse of time between the commission of a crime and eventual prosecution pose, as is the case with all *apartheid* era crimes and post-TRC prosecutions, the jurisprudence of ICTY may be of guidance for this international criminal tribunal have been dealing with similar evidentiary constraints since its establishment in 1994. For purposes of this investigation, it will be necessary to establish whether South African rules of procedure and evidence can accommodate similar approaches to those followed by the ICTY.

The *Rules of Procedure and Evidence* of the ICTY provides a Chamber with a great deal of latitude in admitting evidence. In terms of the general provisions relating to the admissibility of evidence, a Chamber shall apply the rules of evidence which will best favour a fair determination of the matter before it.[391] Consequently, a Chamber may admit any relevant evidence which it deems to have probative value[392] and may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.[393]

Pertaining to witnesses, Rule 89(F) determines that a Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. A Chamber may therefore dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the ICTY, *in lieu* of oral testimony.[394] In cases where a witness has subsequently died, cannot with reasonable diligence be traced, or is by reason of bodily or mental condition unable to testify orally, Rule 92 *quarter* also allows for the admission of evidence of a witness in the form of a written statement or transcript.

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391 Rule 89(B) of the *Rules of Procedure and Evidence* of the ICTY.
392 Rule 89(C) of the *Rules of Procedure and Evidence* of the ICTY.
393 Rule 89(D) of the *Rules of Procedure and Evidence* of the ICTY.
394 Rule 92 *bis* of the *Rules of Procedure and Evidence* of the ICTY.

In order for evidence to be admitted pursuant to Rule 92 *quarter*, two cumulative conditions must be met, namely, the *unavailability* of a witness whose written statement or transcript is sought to be admitted and the *reliability* of the evidence therein.[395] Indicia of reliability include the facts that the written statement or testimony of a witness was made under oath, that the witness was cross-examined in previous proceedings or that his or her evidence is corroborated by other evidence adduced at trial. Evidence admitted under Rule 92 *quarter* must further be relevant to the proceedings as required by Rule 89(C). Rule 92 *quarter* further determines that if the evidence goes to proof of acts and conduct of an accused as charged in the indictment, including that which would establish responsibility for the acts and conduct of others, this may be a factor against the admission of such evidence, or that specific part of it.[396] Jurisprudence of the ICTY[397] confirms that Rule 92 *quarter* does not preclude the admission of such evidence, but only determines that it is a factor against its admission.

The position is to some extent similar in South Africa. The exceptions to the *viva voce* requirement are qualified in that it will only be made under certain circumstances, taking various factors into consideration. In general, section 161 of the CPA determines that a witness at criminal proceedings shall, except where the *CPA* or any other law expressly provides otherwise, give his or her evidence *viva voce*. As with Rule 92 *bis* and 92 *quarter* of the *Rules of Procedure and Evidence* of the ICTY, the *CPA* in sections 214 and 215 also makes provision for circumstances where a court may dispense with the *viva voce* requirement.

If relevant and not otherwise excluded by the normal rules of evidence, the evidence of any witness recorded at a preparatory examination shall, in terms of section 214, be admissible in evidence at the trial of the accused following upon such preparatory examination, if it is proved to the satisfaction of the court that the witness is dead, incapable of giving evidence or too ill to attend the trial. Similarly, section 215 determines that the evidence of a witness given at a former trial may, in

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395 *Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T *Decision on public with confidential annexes C to E – Prosecution motion of admission of the prior trial transcripts of witnesses TF1-021 and TF1-083 pursuant to Rule 92* quarter par. 1.

396 Rule 92 *quarter* par. 2.

397 *Prosecutor v. Prlić et al* ICTY-IT-04-74-T *Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92* bis *and* quarter *of the Rules, 27 October 2006* par. 8.

the circumstances referred to in section 214, *mutatis mutandis* be admitted in evidence at any later trial of the same person upon the same charge.

4.2.2.2 Evidentiary material

Dockets and exhibits have disappeared or have deliberately been destroyed by the perpetrators and their accomplices, leaving gaps in the chain of evidence. With regard to the destruction of records, the TRC Report[398] describes and details the Commission's investigation into the records of the former state and of the process whereby so many crucial state records were destroyed, particularly in the early 1990s when the destruction of documents was undertaken on a massive scale. It further records that the National Intelligence Agency was still destroying records as late as 1996, some two and a half years after the first democratic elections. The relevant chapter of the TRC Report ends with the following finding:[399]

> The mass destruction of records ... has had a severe impact on South Africa's social memory. Swathes of official documentary memory, particularly around the inner workings of the apartheid state's security apparatus, have been obliterated ... Ultimately, of course, all South Africans have suffered the consequences – all are victims of the apartheid state's attempted imposition of a selective amnesia.

Clearly this is a major obstacle that cannot easily be overcome. A prosecutor is dependent on evidence as it is available.[400] Attempts to supplement gaps in the chain of evidence with recourse to other sources, is also not, as will be seen directly below, an easy or always possible alternative.

4.2.3 Section 31(3) of the PNURA

The CSVR recognises that due to the nature of the adversarial criminal justice system in South Africa, the facts and circumstances surrounding gross violations of human rights may not necessarily be revealed in investigations and court proceedings due to evidentiary rules and the due process rights of accused persons. This relates to, amongst others, the constraint posed by section 31(3) of the *PNURA*

398 TRC Report 2003 vol. 1 Ch. 8 par. 1.
399 TRC Report 2003 vol. 1 Ch. 8 paras. 104 and 106.
400 Pretorius T in Villa-Vicencio C and Du Toit F (ed) *Truth and Reconciliation in South Africa: 10 years on* (David Philip 2006) 23-24.

which determines that testimony given at the TRC hearings is inadmissible in a subsequent criminal trial:

> Any incriminating answer or information obtained or incriminating evidence directly or indirectly derived from a questioning in terms of subsection (1) shall not be admissible as evidence against the person concerned in criminal proceedings in a court of law or before anybody or institution established by or under law: Provided that incriminating evidence arising from such questioning shall be admissible in criminal proceedings where the person is arraigned on a charge of perjury or a charge contemplated in section 39 (d) (ii) of this Act or in section 319 (3) of the Criminal Procedure Act, 1995 (Act 56 of 1955).

The rationale behind this limitation was to encourage amnesty applications and it would have undermined the objective of the *PNURA* if perhaps in the event of a failed application there was the potential that applicants might be haunted by incriminating evidence which they had given in the course of the amnesty proceedings.[401]

A clear distinction has to be drawn between incriminating evidence given by an amnesty applicant and evidence given by another implicating someone else. From the wording of section 31(3) of the *PNURA* it is clear that the constraint only applies to incriminating evidence given by an amnesty applicant. In an attempt to overcome the lack of evidence, especially brought about by the afore-mentioned constraint, Bennun notes that the special significance of the proceedings and findings of the Amnesty Committee is that they may include references to and findings about the criminal liability of individuals other than the applicants themselves.[402] He therefore suggests that the proceedings and findings of the Amnesty Committee may possibly be used as admissible evidence amounting to *prima facie* proof by the prosecution in subsequent criminal trials of such persons.

For purposes hereof, Bennun considers the extent to which the rule in the English decision of *Hollington v Hewthorn & Co Ltd* 1943 2 All ER 35 would apply to findings by the TRC. Although the context of this case is totally different to that of the present, the case in short dealt with the general question whether or not

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401 See Bennun ME "Some procedural issues relating to post-TRC prosecutions of human rights offenders" 2003 *SACJ* 24.

402 See Bennun ME "Some procedural issues relating to post-TRC prosecutions of human rights offenders" 2003 *SACJ* 19.

evidence of prior proceedings may be used in subsequent proceedings. With reference to relevance, the "best evidence" rule and the *res inter alios acta* rule, the court in the *Hollington* case answered the question in the negative.

Pertaining to relevance the court held that one court knows nothing of the evidence that was before another court, that one court cannot know what arguments were addressed to another court, or what influenced that court in arriving at its decision.[403] The court did, however, add that it might have been different had the party pleaded guilty or made an admission. This, and not the result of the trial, could have been proved. With regard to the "best evidence" rule, the court held that the evidence fell outside the exceptions to this rule and that such evidence did not make evidence admissible which would otherwise be inadmissible. Finally, based on the *res inter alios acta* rule, the court held that a judgment obtained against one person ought not to be evidence against another person and in this regard referred to a 1776 decision:[404]

> ...it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment that he might think erroneous: therefore . . . the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers.

According to Bennun, the South African decisions and academic commentators seem to leave unresolved the status of the rule in *Hollington v Hewthorn & Co Ltd* in South African law. He accordingly submits that in the present context there is a strong case to be made for the view that neither the rule *simpliciter* nor the reasoning on which it is based can apply to exclude the findings of the Amnesty Committee from the evidence before a court in a subsequent criminal trial. In an attempt to substantiate this view, Bennun investigates relevance, the "best evidence" rule, the *res inter alios acta* rule as well as the hearsay rule which was not specifically addressed by the court in *Hollington v Hewthorn & Co Ltd.*

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403 *Hollington v Hewthorn & Co Ltd* 1943 2 All ER 35 40.
404 *The Duchess of Kingston's Case* (1776) 2 Smith LJ 13ed 644; 20 State Tr 355, 573; 22 Digest 419 4299.

Firstly and with regard to relevance, Bennun argues that based on the facts that the *PNURA* required amnesty applicants to make full disclosure in terms of section 20(1)(c), that soldiers or police officers were required by section 20(2)(b) to set out fully the details of their roles making the commands under which they claimed to have acted fundamental to their amnesty applications and that these issues were clearly covered by sections 30(2)(a) and (b) which afforded the commanders an opportunity to address them before the Amnesty Committee and, to make representations and to give evidence, the incidents covered by the amnesty application, the conduct of the commanders before, and the findings of, the Amnesty Committee might well be relevant at any subsequent trial of such commanders arising there from. He further argues that whether they may have chosen to take advantage of the opportunities offered to them in terms of section 30(2) may affect credibility in subsequent trials. Bennun goes further and holds that the failure to make use of such opportunities is tantamount to an admission of the truth and that the Amnesty Committee's conclusions based on such uncontested evidence could serve as *prima facie* evidence in a subsequent trial.

Secondly, pertaining to the "best evidence" rule, Bennun again holds that the proceedings and findings of the Amnesty Committee may be admissible as *prima facie* evidence, at the least, of the truth of its findings, notwithstanding the "best evidence" rule.

Thirdly Bennun argues that the view in the *Hollington* case, based on the *res inter alios acta* rule, that the issues in the preceding criminal trial were between different parties, does not apply to the criminal trial of, for example, a commander who was cited in the amnesty application of a subordinate in respect of the matters dealt with in that application, and subsequently lying at the heart of the trial of the commander.

Finally on the issue of hearsay and with reference to both Skeen and Schmidt, Bennun concludes that setting aside the rule in the *Hollington* case would have the effect of allowing hearsay testimony to be used if a document was to be admitted showing a conviction in order to prove the truth of its contents. The question, however, is whether or not this should be extended to cover findings of the Amnesty Committee. The law on the admissibility of hearsay evidence in South Africa is now greatly simplified by section 3(4) of the *Law of Evidence Amendment Act* 45 of 1988.

This provision has defined hearsay as evidence, whether oral or in writing, of which the probative value depends upon the credibility of any person other than the person giving such evidence.

Bennun distinguishes between two situations, namely a finding by the Amnesty Committee that, for example Y was X's commander based on evidence in the course of a hearing where Y explicitly acknowledged that he was X's commander and secondly Y's or another witnesses' account of the incident in question.

It is proposed by Bennun that such a finding should be admissible in evidence as *prima facie* proof of the relationship between Y and X – in the event that the point is relevant – in the prosecution of Y. This proposition is based on section 235 of the *CPA* which provides for the proof at a criminal trial of the original record of *judicial* proceedings by means of a copy duly certified by the person having the custody of the record. It is assumed that the proceedings of the Amnesty Committee would qualify as "judicial proceedings" for purposes of this section. The section does not, however, deal with the question of what may be proved by admitting the record. It is suggested that the record would be admissible as *prima facie* proof of the findings of the Amnesty Committee, and that the hearsay rule does not apply.

It is said to be a quite separate matter whether, at a subsequent trial, Y might be confronted by this testimony before the Amnesty Committee on the grounds that it is relevant to his credibility in the light of what he might admit or deny at that trial. In any event, it is noted that an incriminating statement made by Y as a witness before the Amnesty Committee would be inadmissible against him in a subsequent trial.

This is a matter which, according to Bennun, may still have to be settled on the analogy of bail proceedings. In *S v Dlamini*, *S v Dladla*, *S v Joubert* and *S v Schietekat*[405] it was held that section 60(11B)(c) of the *CPA* construed in the light of the *Constitution*, was not unconstitutional when it provides for the record of bail proceedings to be part of the record of the accused's trial following thereafter.

405 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

The question is said not to be whether section 60(11B)(c) of the *CPA* applies to amnesty applications, for it clearly does not,[406] but whether the nature of an amnesty hearing is such as to develop the common law so as to bring such a hearing within the Constitutional Court's general reasoning.

Again the constraint posed by section 31 of the *PNURA* becomes relevant and the Constitutional Court may yet have to speak on the scope and effect thereof. Bennun raises the following questions in this regard:

a) Does the inadmissibility extend to protect someone who appeared voluntarily in terms of section 30, and testified without seeking the protection according to the procedures set out in section 31?

b) Further, what if a person who was given notice under section 30 elected not to use the rights established by the section, and the Amnesty Committee makes a finding about that person's involvement in the matters forming the basis of the application for amnesty?

c) And further still: while incriminating matters which have been elicited as described briefly above are inadmissible, how does this affect the admissibility of the findings of the Amnesty Committee as a whole?

Bennun reaches the conclusion that the rule in *Hollington v Hewthorn & Co Ltd* is now of limited or no application, and that the record of findings by the Amnesty Committee may accordingly constitute important incriminating evidence which is available to a criminal court hearing cases arising from human rights violations.

As appealing as Bennun's arguments and suggestions may sound, it is argued here that it cannot succeed because it is based on the incorrect assumption that the proceedings before the Amnesty Committee were "judicial proceedings". The Amnesty Committee was not "a court of law" and not intended or authorised to settle "justiciable disputes". All it was simply required to decide was whether or not

406 Nor, for that matter, do s 211 (the admissibility of previous convictions); s 214 (the circumstances under which evidence taken at a preparatory examination may be admitted at the trial); and s 215 (dealing similarly with the admissibility of evidence taken at a former trial) apply. See Bennun ME "Some procedural issues relating to post-TRC prosecutions of human rights offenders" 2003 *SACJ* 35.

amnesty should be granted in respect of a particular act, omission or offence.[407] The rules of natural justice which include the right to cross-examine witnesses do not automatically apply to commissions of enquiry such as the TRC. This is based on the view that commissions of enquiry do not affect the rights of persons investigated by such a commission. As will be discussed in more detail below,[408] this view can, however, be qualified. It can be argued that the recommendations made by an Amnesty Committee such as the case with the TRC can indeed affect an amnesty applicant's rights in the sense that their applications are normally evaluated on the strength of uncontested evidence, and should their application be turned down, such a decision can lead to further investigation and eventual prosecution. The afore-mentioned view, however, does not change the fact that the rules of natural justice were not applicable during the TRC's and Amnesty Committee's proceedings.

In this regard, special reference can be made to the legal analysis and policy considerations in a "Briefing Paper" on the relationship between the Sierra Leonean Special Court and the Sierra Leonean Truth and Reconciliation Commission. According to the "Briefing Paper", one of the most apparent issues in respect of the relationship between the two institutions is the question of disclosure to the Special Court of information provided in confidence to the TRC. The Office of the Attorney General and Ministry of Justice Special Court Task Force held in 2002 that the Special Court is a judicial institution that would initially apply the *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda* (*ICTR Rules*), modified by its Judges with due regard to the *Criminal Procedure Act* 32 of 1965 of Sierra Leone. Under the *ICTR Rules*, and even more so under the Sierra Leonean *Criminal Procedure Act*, it is held that information such as that received by the TRC would not be such that it may be admissible as evidence by the Special Court. This contention is based on the fact that the information would be untested by cross-examination and it is further argued that Judges would, with little doubt, not be satisfied with such information as evidence of the facts recounted. Finally, it is submitted that such information in itself could not be tendered as evidence in an open court.

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407 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par. 8.

408 See also par. 2.3.1.2 of Ch. 5 below for De Ville's conclusion on the duty to act fairly.

The same reasoning applies to the current South African context and the conclusion is reached here that due to the fundamental difference in nature between the TRC and a court of law, the record of findings by the Amnesty Committee cannot be regarded as "evidence" and consequently cannot not used in subsequent trials.

4.2.4 Plea and sentence agreements

In view of the above-mentioned constraints on the criminal justice system, the question is whether or not standard arrangements in the normal execution of justice and the prosecuting mandate, which are accommodated in existing legislation, such as plea and sentence agreements, can be implemented to minimise the consequences of such constraints.

For purposes hereof and pertaining to the lack of evidence, section 105A of the *CPA* will firstly be investigated. This section permits the NPA and a legally represented accused to enter into a plea and sentence agreement in terms of which the accused pleads guilty to a specified charge, subject to the imposition of a specified sentence. Significantly, section 105A(1)(b)(iii) makes provision for the participation of victims, or their legal representatives, or relatives in the case of homicide,[409] or a person in *loco parentis* in the case of a minor,[410] where plea and sentence agreements are negotiated between the prosecutor and the accused. At first glance, this arrangement seems like the perfect solution for it addresses both the lack of evidence and promotes victim participation.

Although a brief summary of section 105A is included here, the aim is not to scrutinise the entire section as such, for it has already been done extensively elsewhere.[411] Pertaining to the merits and demerits of the application of this section to post-TRC prosecutions, certain elements thereof will, however, be highlighted.

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409 Directive 11 of the *Directives of the National Prosecuting Authority*.

410 Directive 10 of the *Directives of the National Prosecuting Authority*.

411 For a more thorough investigation of section 105A of the *CPA*, see amongst others: South African Law Reform Commission Discussion Paper 94 (Project 73) "Simplification of Criminal Procedure (Sentence Agreements)" (2001); Du Toit E *et al* Commentary on the Criminal Procedure Act Revision Service 37 2007 15-6 and 15-7; Joubert JJ (ed) *Criminal Procedure Law* 7th ed (Juta Claremont 2005) 206-208; De Villiers W "Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?" 2004 *De Jure* 244-255; Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 17-45; Steyn E "Plea-bargain in South Africa: current concerns and future prospects" 2007 *SACJ* 206-219; Bekker PM "Plea bargaining in the United States of America and South Africa" 1996 *CILSA* 168-222 and Anderson A "Step-by-Step Formal plea-and-sentence agreements" 2005 *De Rebus* 28-29.

Plea-bargaining before the commencement of the current constitutional dispensation was unsatisfactory, for it served to de-legitimise criminal justice by bypassing the court and hacking an insensitive shortcut through the undergrowth of jurisprudence.[412] The South African Law Commission[413] therefore recommended legislation to regulate this informal procedure in a manner that took care of ensuring that no injustices occurred, and to create a role for victims to make representations and to insist that agreements include compensation and to further the development of restorative justice.[414] On the one hand, the desired consequence was to enhance the legitimacy of the criminal justice system and to ensure the quality of a trial by requiring it to comply with various minimum standards, and on the other hand, to simplify and streamline criminal trials.[415]

Following the recommendation by the Law Commission to improve the practice of plea-bargaining, the *CPA* was amended and section 105A inserted. The central innovation is the statutory formalisation of plea agreements and the fact that the prosecutor can now also reach an agreement with the defence on the proposed sentence to be imposed.[416]

Although this mechanism contemplated in section 105A is available, it does not mean that it will be suited to and applied in every case. From statistics Steyn[417] collected from the NPA[418] in order to establish the impact this mechanism has on the South African justice system, it was evident that the prosecution only succeeded in reaching plea and sentence agreements in 2 164 cases during the relevant period. In response to the question why some jurisdictional divisions seldom make use of this mechanism, the NPA replied and stated that this mechanism cannot be employed in all cases and that it depends on the merits and circumstances of each case whether or not it will be possible to do so.[419]

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412 Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 17 and 19.
413 South African Law Reform Commission Discussion Paper 94 (Project 73) "Simplification of Criminal Procedure (Sentence Agreements)" (2001) par. 5.18. See also Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 18-19.
414 Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 17 and 19.
415 Bennun ME 'Negotiated pleas: policy and purpose" 2007 *SACJ* 21.
416 Joubert JJ (ed) *Criminal Procedure Law* 7th ed (Juta Claremont 2005) 17.
417 Steyn E "Plea-bargain in South Africa: current concerns and future prospects" 2007 *SACJ* 215.
418 *National Prosecuting Authority Annual Report 2005/2006*.
419 Steyn E "'Plea-bargain in South Africa: current concerns and future prospects" 2007 *SACJ* 216.

Section 105A permits an authorised prosecutor and a legally represented accused to negotiate and conclude a plea and sentence agreement[420] without the court being party to the negotiations and conclusion of the agreement as such.[421] Some have highlighted the exclusion of unrepresented accused as a constitutional challenge in that unrepresented accused are excluded from the benefits of the mechanism section 105A provides for, resulting in the fact that not all accused enjoy equal protection before the law in terms of section 9(1) of the *Constitution*. Some even went as far as saying that only the rich, who can afford legal representation, can bargain their way out of prison.[422]

In discussing challenges facing the concept of plea-bargaining, Steyn[423] failed to bring section 35(2)(c) of the *Constitution* into the equation which affords each arrested, detained or accused person the right to legal representation on the State's expense and to be informed of such right without delay, provided it does not lead to material unjust. Furthermore, she overlooked the reason why unrepresented accused are excluded, which is to ensure that this mechanism is only applied to cases where the accused understands the nature, extent and consequences of this mechanism after having been informed and advised by their legal representatives.

A prosecutor may enter into a plea and sentence agreement after consultation with the investigating officer[424] unless the prosecutor is of opinion that it will delay the proceedings and cause substantial prejudice or affect the administration of justice adversely.[425] Furthermore, and important for the context of this paper, as previously mentioned, provision is made to afford victims[426] the opportunity to make representations regarding the contents of the agreement and the inclusion of a condition relating to compensation for damage or pecuniary loss or the rendering of

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420 See in general s 105A(2) of the *CPA* for the formal requirements a plea and sentence agreement has to comply with.

421 Section 105A(1) and (3) of the *CPA*.

422 African National Congress Youth League and Independent Democrats. See Hartley W 2005 NPA defends 'strategic' deal with Thatcher http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=1698159 [date of use 13 July 2007]. See also Steyn E "Plea-bargain in South Africa: current concerns and future prospects" 2007 *SACJ* 218.

423 Steyn E "Plea-bargain in South Africa: current concerns and future prospects" 2007 *SACJ* 217-218.

424 Section 105A(1)(b)(i) and (ii) of the *CPA*.

425 Section 105A(1)(c) of the *CPA*.

426 Victims for purposes of this paper also include other persons as contemplated by s 105A and the *Directives of the National Prosecuting Authority*.

some specific benefit or service instead of compensation.[427] This will be possible where it is reasonable to do so, taking into account the nature of and circumstances relating to the offence and the interests of victims. The court in *S v Sassin*[428] strongly emphasised the importance of victim participation and held that it enhances the transparency of the process and lends credibility to the maxim that "justice must not only be done, but also be seen to be done".[429]

Not only does section 105A(1)(b)(iii) provide for the protection of the victim's personal interests, but also for the interests of the criminal justice system and society's interests, which can play a vital role in this phase of transformation South Africa is facing at the moment, i.e. post-TRC prosecutions. Society benefits from victim participation firstly in that the right to participate will result in more information being provided to the decision-maker and secondly in that it promotes the effective functioning of the criminal justice system.[430]

On face value this correlates with the sentiments expressed in the ambit of the *PNURA* which states that its aim is, amongst others, to afford victims an opportunity to relate the violations they suffered and to take measures aimed at the rehabilitation and the restoration of the human and civil dignity of victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights. Clearly here, victims are the focal point in the promotion of national unity and reconciliation and similarly their interests should be of paramount importance in pursuing "post-TRC prosecutions", as successive measure to the TRC's amnesty scheme.

One of the aims of section 105A is to lighten the burden the accused has to bear in the sense that the accused faces less serious implications as far as sentence is concerned, and to save the state the time and expense involved in a lengthy criminal trial with all of its attendant evidentiary risks. To prevent a narrow interpretation of this aim, it should be emphasised that the directives of the NPA

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427 Section 105A(1)(b)(iii) of the *CPA*.

428 *S v Sassin* 2003 4 All SA 506 (NC).

429 *S v Sassin* 2003 4 All SA 506 (NC) par. 11.4. See also Du Toit E *et al* Commentary on the Criminal Procedure Act Revision Service 37 2007 15-12.

430 Bekker PM "Plea bargaining in the United States of America and South Africa" 1996 *CILSA* 168-222. See also Du Toit E *et al* Commentary on the Criminal Procedure Act Revision Service 37 2007 15-12.

make it clear that this mechanism should only be considered for matters of substance, the disposal of which will actually serve the purpose of decongesting or reducing court rolls without sacrificing the demands of justice and/or the public interest.[431]

To achieve this aim, a plea to a lesser offence (which may be an offence which is a competent verdict to the offence charged or an alternative charge) is negotiated with the prosecutor, which the latter agrees to accept.[432]

An agreement is reached on the facts which are to be placed before the court to justify a conviction on the basis agreed on. The prosecutor will, before the accused is required to plead, inform the court of such agreement and the court shall then ask the accused to confirm the agreement. The court will then satisfy itself that all relevant requirements[433] have been met.[434] Should the court find that certain of these requirements were not met, it should give the parties the opportunity to comply with such requirements.[435] Should the court find that the requirements have been met, it will request the accused to plead to the charge and order that the contents of the agreement be disclosed in court.[436]

Once the contents of the agreement have been disclosed, the court must question the accused on the contents of the agreement in order to be satisfied that the accused confirms the terms of the agreement and the admissions made by him or her therein; that he or she is in fact admitting to all the allegations in the charge and that the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.[437] If the court is not satisfied, it will record a plea of not guilty and inform the parties of the reasons for its finding.[438] The effect of this is that the trial must start *de novo* before another presiding officer: provided the accused may waive this right to be tried before

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431 Directive 2 of the *Directives of the National Prosecuting Authority*. See also Anderson A "Step-by-Step Formal plea-and-sentence agreements" 2005 *De Rebus* 28.
432 Joubert JJ (ed) *Criminal Procedure Law* 7th ed (Juta Claremont 2005) 206.
433 Section 105A(1)(b)(i) and (iii) of the *CPA*.
434 Section 105A(4)(a) of the *CPA*.
435 Section 105A(4)(b) of the *CPA*.
436 Section 105A(5) of the *CPA*.
437 Section 105A(6)(a) of the *CPA*.
438 Section 105A(6)(b) of the *CPA*.

another presiding officer.[439] If the court is satisfied, it will proceed to the sentence agreement without, for the moment, recording a conviction.[440]

When considering the sentence agreement, the court must be satisfied that the sentence agreed on is just. In doing so the court cannot, as suggested by Bennun,[441] simply decide for itself *in vacuo* what sentence it would have imposed, had the matter gone to a full trial. In order to determine a just sentence, the court must consider the traditional factors, namely the circumstances of the accused, the nature of the offence, the interest of society and any relevant aggravating and/or mitigating circumstances. Steyn[442] correctly indicated, by referring to relevant authority,[443] that the court should also take the plea and sentence agreement into account, which is based on a host of practical and factual considerations to which the state and the defence are privy. Furthermore, the court should also take into account that the prosecutor and the accused's defence have assessed the merits and demerits of the State's case and the accused's defence.

If the court is satisfied that the sentence is just, the court will convict the accused and sentence the accused to the agreed sentence.[444] If the court is not satisfied, it will inform the parties of the sentence which it considers just.[445] In this event, there are two possibilities. Firstly the parties to the agreement may decide to abide by the agreement on the merits, and the court will then convict the accused and proceed to consider sentence in the normal manner[446] or secondly, one of the parties to the agreement may decide to withdraw from the agreement, which will again mean that the trial must start *de novo* before another presiding officer: provided the accused may waive this right to be tried before another presiding officer.[447]

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439 Section 105A(6)(c) of the *CPA*.
440 Section 105A(7) of the *CPA*.
441 Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 29.
442 Steyn E "Plea-bargain in South Africa: current concerns and future prospects" 2007 *SACJ* 214.
443 *S v Sassin* 2003 4 All SA 506 (NC) par. 15.7; *S v Esterhuizen* 2005 1 SACR 490 (T) and *S v Zinn* 1969 2 SA 537 (A).
444 Section 105A(8) of the *CPA*.
445 Section 105A(9)(a) of the *CPA*.
446 Section 105A(9)(b)(i) and (c) of the *CPA*.
447 Section 105A(9)(b)(ii) and (d) of the *CPA*.

In the latter event the agreement will be regarded as *pro non scripto* and no regard may be had or reference made thereto, but the accused may, however, consent to all or certain of the admissions made in the agreement or in the course of proceedings.[448] The parties may not enter into another plea and sentence agreement in terms of section 105A in respect of a charge arising from the same facts,[449] although informal plea-bargaining may be considered in minor cases.[450] Section 112 of the *CPA* in terms of which an accused pleads guilty may further also be considered.[451]

Some jurisdictional divisions implement section 112 proceedings instead of those section 105A provides for. This may be because section 112 proceedings are less burdensome and time consuming. Another reason may be because an unqualified guilty plea in terms of section 112 may also show remorse and save the state the time and expense involved in a lengthy criminal trial which may result in the presiding officer taking the said plea into account as a mitigating factor which may in turn result in a lesser sentence. Although it may be said that the effect of section 112 and section 105A is similar, the difference is evident from the fact that section 112 proceedings place no obligation on the prosecutor to consult with victims and is therefore less burdensome and time consuming than the section 105A mechanism which does require consultation where it is reasonable to do so.

Bennun[452] is probably correct when he points out that the introduction of the TRC's culture into the criminal justice system might have been what was intended by parliament with the adoption of section 105A. If this was so, then at least "restorative justice" may also relate to the manner in which the victim and the offender are seen to be more active participants in section 105A proceedings.

Various advantages and disadvantages of plea and sentence agreements have been identified.[453] An obvious advantage is securing a conviction of a guilty accused, and as indicated above, saving the state the time and expense involved in a lengthy criminal trial with all of its attendant evidentiary risks, and in return the

448 Section 105A(10)(a) of the *CPA*.
449 Section 105A(10)(b) of the *CPA*.
450 Joubert JJ (ed) *Criminal Procedure Law* 7th ed (Juta Claremont 2005) 208.
451 Section 112 of the *CPA*.
452 Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 30.
453 De Villiers W "Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?" 2004 *De Jure* 244-255.

accused faces less serious implications as far as sentence is concerned. This compromise the court, the victim and interested or affected parties have to make pertaining to a lesser sentence, which the court has to find just, is arguably a small price to pay for the desired result, namely a guilty conviction.

Other advantages include simplifying criminal procedure; accelerating the process; improving effectiveness of the criminal justice system; addressing the back log in courts; and protecting the victim against secondary trauma suffered due to repeated exposure to the facts in court and in the media.[454] The afore-mentioned is in line with the spirit of the policy amendments in that renewed traumatisation of victims should be prevented.[455]

Disadvantages may include problems concerning the motivations of the actors in the system who may be prepared to accept a plea and sentence agreement in order to lessen their workload; circumvention of the standards of proof and due process of the criminal justice system; coercing accused into waiving their constitutional rights in return for a lesser sentence; the imposition of lenient sentences leading to sentencing disparities which undermine the credibility of the entire system; diminishing the deterrent effect of criminal sanctions in that criminals know that even when they are caught, the struggling criminal justice system will offer them plea and sentence agreements resulting in lenient sentences; and an innocent accused pleading guilty and accepting a lesser sentence for fear of taking the risk of being convicted and sentenced harshly.[456]

Simply doubting the motivations of the actors in the system, amounts to a generalisation, which is not reasonable towards those actors who act in good faith. With regard to the possible circumvention of the standards of proof and due process of the criminal justice system; coercing accused into waiving their constitutional rights in return for a lesser sentence; and the imposition of lenient sentences leading to sentencing disparities which undermine the credibility of the entire system, it is argued that these possible disadvantages can be curbed by existing mechanisms section 150A provides for, such as subsections (6) and (7) relating to the court's vital

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454 De Villiers W "Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?" 2004 *De Jure* 245.
455 Part C, paras. 3 (f) and (g) of the policy amendments.
456 De Villiers W "Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?" 2004 *De Jure* 245.

role in evaluating the plea and sentence agreement. Every case is further dealt with on its own merits, and sentencing disparities between different cases are therefore understandable in view of the varying circumstances and factors that need to be considered in each case.

The plea and sentence agreement has to present sufficient evidence to satisfy the court that the agreed plea and sentence are sound in law. Agreements which present facts in a particular way, containing only just sufficient information to satisfy the court or perhaps just not enough to implicate someone else or not to mention an aggravating circumstance are, however, a matter of concern,[457] but not distinctive to plea and sentence agreements. In this regard, and as mentioned earlier,[458] trials are held to be ill-suited to deal with the task of providing a complete picture due to their adversary nature where the duty of the prosecutor is to focus on limited facts relevant to the guilt of the individual before the court, and the duty of the defence is to challenge those facts. It is proposed here that in this instance one has to rely on the court's intuition when scrutinising the evidence placed before it, for it may be possible to uncover concealed evidence from that evidence placed before the court. The fact that the plea and sentence agreement ultimately has to stand the test in court is often overlooked, resulting in critique that the court is bypassed. It is submitted that the reason why the court is not made part of the negotiations and conclusion of plea and sentence agreements, is to ensure an objective evaluation of the agreement when it is being presented and tested in court. The final decision remains with the court and if it is not satisfied with the agreed plea and/or sentence, the court will not accept it and the trial then has to start *de novo*. Should the court be satisfied with the agreed plea and sentence, it can be accepted that the court is also satisfied with the manner in which the parties to the agreement accomplished their task by considering the applicable law in the light of the relevant circumstances of the particular case. To say that section 105A implies a simplistic way of predicting the outcome of a trial is therefore short-sighted.

With regard to the deterrent effect of a criminal sanction it is submitted that a guilty conviction followed by the imposition of a sentence found just by the court in terms of section 105A has this very effect. Finally it must also be made clear that, in

457 See Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 21.
458 See par. 5.2.2 Ch. 2 of this book.

order to reach a compromise, an accused may tender during the negotiations to plead guilty to a charge of which he or she is indeed guilty, but in respect of which the state may have had considerable difficulty in achieving a conviction.[459]

In short, as correctly indicated by Bennun,[460] the potential benefits from section 105A would only endanger the legitimacy of criminal justice if care were not taken when applying the said section.

Section 105A proceedings were implemented in the case of *State v Van der Merwe, Vlok, Smith, Otto and Van Staden*.[461] The court convicted the accused in terms of the plea agreement and in considering the agreed sentence, it took the traditional factors and the plea and sentence agreement into account. Although a *prima facie* case was already made out against Smith, Otto and Van Staden with regard to the poisoning of Rev. Chikane, the prosecution admitted that the accused (Van der Merwe and Vlok) helped the prosecution considerably by pleading guilty and providing information the prosecution would otherwise have had difficulty to obtain in order to prove the charge. The prosecution was not in possession of sufficient evidence relating to the share Van der Merwe and Vlok had in the attempt on Rev. Chikane's life and only became aware of this with the co-operation of the afore-mentioned accused.[462] Smith and Otto further came forward with the facts relating to their share.

The accused were found guilty and suspended sentences were imposed. It can therefore be argued that the guilty conviction of all five accused would not have been as straightforward had it not been for the plea and sentence agreement mechanism section 105A provides for. Due to the complex nature of these cases and the limited availability of sufficient and admissible evidence, it can also be argued that section 105A is a vital mechanism for justice to be done in this regard, which in turn may play a constructive role towards healing the nation.

Some critics are in favour of this mechanism being applied to post-TRC prosecutions, since it prevents a guilty accused from escaping liability while others are opposed to it on the basis that plea and sentence agreements are concluded

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459 *S v Esterhuizen* 2005 1 SACR 490 (T) paras. 493H-494H.
460 Bennun ME "Negotiated pleas: policy and purpose" 2007 *SACJ* 20.
461 *State v Van der Merwe, Vlok, Smith, Otto and Van Staden*, case heard in the Gauteng North High Court on 17 August 2007.
462 Mitigating circumstance considered.

behind doors, that sentence is not harsh enough; consequently providing a back door to amnesty.[463]

It appears that the public's perception of openness in this matter is somewhat misconceived. Section 105A(1)(b)(iii) provided Rev. Chikane with the opportunity to make representations. He was the victim after all and to whom justice was owed. The victim, the prosecution and the court were further all satisfied with the agreed plea and sentence.

The reason for the divided reaction is perhaps due to the fact that the public's minds were fixed on a sentence they anticipated and which they found appropriate, assuming that the prosecution had sufficient admissible evidence to back their expectations. This approach does not take the circumstances of the particular case into account and leaves no room for a compromise in order to obtain sufficient information. It is furthermore doubtful whether a guilty conviction and a sentence found just by the court can be said to be equivalent to amnesty.

4.2.5 Indemnity agreements

The South African witness privilege against self-incrimination or right to passive defence as it is also known, is recognised in common law[464] and statute.[465] This privilege may be invoked as a shield against trial examinatory questioning of which the answers may expose the witness to a criminal charge.[466]

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463 Sooka Y "The TRC's Unfinished Business: Prosecutions" in Villa-Vicencio C and Du Toit F (eds) *Truth and Reconciliation in South Africa: 10 Years On* (David Philip Claremont 2006) 22 and Klaaren J "Persistence & Amnesty: The New Prosecutions Policy" (Unpublished paper delivered at the Law and the Apartheid Past: AZAPO v President of the RSA – Ten Years Later Conference UNISA 18 August 2006 Pretoria). The afore-mentioned paper is based on Klaaren J and Varney H "A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty" in Villa-Vicencio C and Doxtader E (eds) *The Provocations of Amnesty: Memory, Justice and Impunity* (David Philip Claremont 2003) 265-293.

464 *R v Camane* 1925 AD 570 and *S v Lwane* 1966 2 SA 433 (A). See Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 375.

465 Sections 200, 203, 217, 219A of the *CPA* and s 35 of the *Constitution.* See Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 375.

466 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 375.

Section 35(3) of the *Constitution* awards each accused the right to a fair trial and recognises the rule against self-incrimination[467] as a constitutional right insofar as it protects the accused person's right to a fair trial.

Section 203 of the *CPA* is in compliance with section 35(j) of the *Constitution* and gives effect thereto by excusing a witness from answering incriminating questions by determining that:

> No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge.

Procedural safeguards such as the privilege against self-incrimination awarded to witnesses by section 203 of the *CPA*, may occasionally present a formidable obstacle to a successful prosecution because of the strong evidentiary barrier it creates affecting the State's ability to compel witness testimony in court.[468]

The effect of this privilege is ameliorated by section 204 of the *CPA*. This section is designed to elicit damaging testimony from accomplices or accessories by testifying against major co-offenders in return for an indemnity against prosecution.[469] Persons criminally associated with the accused are therefore compellable witnesses and such witnesses are deprived of the privilege set out in section 203.[470]

When the prosecutor calls a witness as contemplated in this section, the court must first be informed[471] that it will be required of that witness to answer to all questions, including those that may incriminate such witness with regard to a specified offence.[472] If the court is satisfied that such a witness is also otherwise a

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467 Section 35(j) *Constitution*.

468 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 373.

469 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 373 and 375.

470 Du Toit E *et al Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50B.

471 Section 204(1) of the *CPA*. If the prosecutor fails to inform the court, the witness' obligation does not arise. See S *v Govender* 1967 2 SA 121 (N) and Kruger A *Hiemstra's Criminal Procedure* Issue 1 (LexisNexis Butterworths Durban 2008) 23-50.

472 Section 204(1) of the *CPA*. The prosecutor need not always specify an offence before calling a witness for it may only appear that a witness will incriminate him- herself in the course of giving evidence. See *S v Bosman* 1978 3 SA 903 (O), *S v Kleinschmidt* 1980 1 SA 852 (A) and Du Toit E *et al Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50C.

competent and properly sworn in witness,[473] the court shall inform the witness of the contents of section 204(1)(a). Firstly that he or she is obliged to give evidence,[474] secondly that questions may be put to him or her that may incriminate him or her with regard to the specified offence,[475] thirdly that he or she is obliged to answer such questions, either by the prosecutor, the accused or the court[476] and finally that if he or she answers frankly and honestly,[477] he or she will be discharged from prosecution with regard to the specified offence and any other offence in respect of which a guilty verdict would be competent upon a charge relating to the specified offence.[478]

After having been informed by the court, the witness has to give evidence as contemplated in terms of the aforementioned section.[479] At the end of the trial and after all the witnesses have testified and argument has been heard; thus, after a proper evaluation of the witness' evidence in view of all the other evidence, the court should decide whether or not it is satisfied with the witness' testimony.[480]

When section 204 is employed, the witness has a legitimate expectation to be discharged if the answers to the questions are frank and honest. Accordingly, the witness is entitled, in terms of the *audi alteram partem* principle, to a hearing before a decision may be made not to discharge him or her from prosecution. In *S v Kheswa*[481] it was held that although a presiding officer could not make the decision whether or not to discharge the witness prior to judgment, there was no reason why he or she should not hear the witness's representations on the matter prior to giving judgment without deciding on the issue at that stage. If this was not the case, the

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473 *S v Hendrix* 1979 3 SA 816 (D). See E du Toit *et al Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50C.

474 Section 204(1)(a)(i) of the *CPA*.

475 Section 204(1)(a)(ii) of the *CPA*.

476 Section 204(1)(a)(iii) of the *CPA*.

477 It is an irregularity to warn the witness that he or she is required to answer all the questions put to him or her 'to the satisfaction' of the court. See *S v Ncube* 1976 1 SA 798 (RA). Such a warning may induce in the witness a belief that the court will not be satisfied unless he or she implicates the accused. See Du Toit E *et al Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50D.

478 Section 204(1)(a)(iv) and (2) of the *CPA*; *S v Waite* 1978 3 SA 896 (O) and *S v Bosman* 1978 3 SA 903 (O). See Du Toit E *et al Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50C.

479 Section 204(1)(b) of the *CPA*.

480 *S v Mnyamana* 1990 1 SACR 137 (A); *S v Dhlamini* 1978 4 SA 917 (N) and *S v Mokoena* 2003 1 SACR 74 (T). See Du Toit E *et al Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50D.

481 *S v Kheswa* 1997 2 SACR 638.

witness would not be accorded a full right to be heard, since the presiding officer, if he or she had first to deliver judgment, might well have reached conclusions of fact as to whether or not the witness had answered the questions frankly and honestly. To permit the witness to make representations only at that stage in an endeavour to persuade the presiding officer to change his or her mind would stultify his or her right to be heard.

If the presiding officer is satisfied, he or she should discharge the witness from prosecution, but a discharge does, however, not include indemnity from a civil liability, as was the case with the TRC.[482]

If the witness is not discharged from prosecution, such evidence cannot then be used against him or her in any subsequent proceedings in respect of the offence in question, except for perjury from the giving of such evidence.[483] It would otherwise be unfair to the witness if he or she faced the risk of being prosecuted on the strength of his or her testimony, given without the protection of the privilege against self incrimination and which furthered the State's case, placing the State in an unfair advantage. In *S v August* and *S v Pillay* it was, however, held that a prosecutor has wide discretionary powers and that the State is entitled to prosecute a person it had treated at first as a witness. The state can, for example, withdraw an offer made to a person in terms of section 204 under certain circumstances.[484]

Although the witness indemnity mechanism contemplated in section 204 of the *CPA* is available, it does not mean that it will, as with section 105A of the CPA, be suited to and applied in every case. The practice of allowing persons "to turn State witness" should only be followed with the greatest caution.[485] Furthermore, this section makes no specific mention of the word "indemnity" to be tendered by a prosecutor. However, it may be said that a prosecutor, by specifying an offence with the intention that this section should be applied, offers that a witness will be discharged from prosecution, but only under the circumstances and to the extent set out in section 204(2).[486] Critics have gone so far as to say that perpetrators may

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482 Paragraph 3(d), part A of the policy amendments.
483 Section 204(4) of the *CPA*.
484 Du Toit E et al *Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50C
485 Du Toit E et al *Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50B.
486 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 2003 376 and *S v Waite* 1978 3 SA 896 (O). See Du Toit E *et al Commentary on the Criminal Procedure Act* Revision Service 36 2006 23-50C.

"apply" to the NDPP for indemnity from prosecution where after the NDPP may then exercise discretion not to prosecute such "applicants" if they comply with certain requirements.[487] This is clearly wrong because no application procedure for indemnity from prosecution exists within the NPA or in terms of the CPA, and the fact that section 204 might be implemented in certain cases does not transform the entire prosecution process into an amnesty process. Based on this incorrect assumption, the incorrect conclusion is reached that victims and their families are deprived of justice. In fact, the very aim and purpose of section 204 is to secure conviction and thereby ensuring that justice is done.

In line with Varney's proposed prosecution strategy[488] and the prosecution priorities proposed by the *CSVR* in their *Alternative Prosecution Policy Framework*,[489] the prosecutions of superiors who are most responsible should be prioritised. To secure the conviction of these superiors, the testimony from accomplices or accessories who testify against major co-offenders will in some cases be crucial, especially given the constraints highlighted above. In return a few minor-perpetrators might receive indemnity from prosecution, which is a matter of compromise and the phrase "don't be penny wise and pound foolish" captures the essence of what section 204 aims to achieve. This type of "transactional indemnity" is designed to arrive at a balanced and rational accommodation between two fundamental imperatives of the accusatorial system, namely the State's need to secure information concerning criminal conduct and the witness's need to remain silent about self-incriminating facts.[490] Some critics do, however, not agree. According to Theophilopoulos, the legitimacy of a trial is disturbed when one side (the witness) is compelled to further the cause of the other (the prosecution) and that the mechanism section 204 provides for is an unbalanced remedy because it favours the witness above the state.[491]

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487 Anon 2007 Challenge claims amended prosecution policy infringes constitutional rights http://www.lrc.co.za/Articles/Articles_Detail.asp?art_ID=339 [date of use 20 July 2007].

488 See par. 3 of this Ch. above.

489 *CSVR's Alternative Prosecution Policy Framework* par. 6 and in particular subparagraph (v) thereof.

490 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 373-374.

491 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 384-385.

This mechanism also has its advantages and disadvantages which, to a certain extent, compare with those mentioned under section 105A above. The plea and sentence agreement and the indemnity grant have distinct similarities. Their dominant purpose is to secure some form of procedural co-operation between the State and the private individual, thereby avoiding the risks and costs of an extended trial.

It is argued that the main aim and advantage of section 204, in the context of post-TRC prosecutions, is to secure conviction of those alleged human rights violators during the relevant period under scrutiny by the TRC who created the milieu of disregard for human rights, oppression and violent conflict in the *apartheid* era by eliciting evidence from their indoctrinated subordinates.

Possible disadvantages of this mechanism have been identified as the danger of an inexperienced prosecutor entering into an agreement which excessively forgives past crimes or mistakenly indemnifies the wrong co-offender or the wrong crimes and the danger of an unscrupulous prosecutor who imposes unfair obligations on the state witness or make use of untruthful indemnified testimony against the identified target.[492] Another disadvantage concerns the truthfulness and credibility of the witness' evidence where the witness is tempted to give wide-ranging but shallow testimony in the hope that it would provide protection for every offence touched upon.[493] A further disadvantage may include an absolute bar on a future criminal prosecution despite the existence of independent evidence; thus making it impossible for the State to correct any mistakes.[494]

With reference to the dangers of inexperienced and unscrupulous prosecutors it is submitted that this danger is limited with regard to post-TRC prosecutions. This is due to the fact that the PCLU is responsible for overseeing the investigations and instituting prosecutions assisted by senior designated officials of various departments and other components of the NPA. It is further submitted that other disadvantages can be curbed by existing mechanisms this section provides for in that the witness's evidence must meet the standards set by section 204(1)(iv) and (3)

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492 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 377-378.

493 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 383-384.

494 Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *SALJ* 383.

of the *CPA*. In order to establish this, the evidence has to be tested and evaluated by the court in the light of all other evidence.

5 Sentencing

Another pertinent issue is that of appropriate sentencing. Due to the fact that *apartheid* era crimes are prosecuted as ordinary crimes in terms of South African criminal law, ordinary sentences in terms of the existing sentencing framework are available. The question, however, is whether or not these sentences are appropriate in the context of transformation and reconciliation. To answer this question, one must establish what the aim of post-TRC prosecutions is. Surely it is to bring perpetrators to justice, but what does "justice" mean to the victims of *apartheid* era crimes? To truly contribute to and compliment the TRC's legacy, a victim-centred approach, as with the TRC, seems prudent.

5.1 The CSVR's Alternative Prosecution Policy Framework

The CSVR[495] suggests that in cases where the imprisonment of convicted offenders is not appropriate, prosecutions can be concluded with community service diversions,[496] suspended sentences[497] or correctional supervision orders.[498] In this regard, it is possible to divert perpetrators before trial into community service programmes and/or to sentence offenders by way of suspended sentences or correctional supervision. In turn, these sanctions could result in admissions of guilt, judicially sanctioned deprivations of liberty and sentencing conditions that require victim reparations and community service.

Pertaining to restorative justice (including victim empowerment and ex-combatant reintegration) it is further suggested[499] that endeavours to add restorative justice initiatives to complement prosecutions for past political violence also be undertaken with the view that these programmes can add long-term value to the

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495 *CSVR's Alternative Prosecution Policy Framework* par. 7(i)(d).

496 *CSVR's Alternative Prosecution Policy Framework* fn 31: "Diversion is a process whereby a criminal matter is removed from court proceedings pending prosecution if diversion conditions, such as community service, are met. There is no specific legislative prescription for diversion, but it occurs informally in child offender matters by way of postponement of sentence or remand of a matter to a future date. Diversion may be applicable to transitional justice matters as the criminal justice system is not equipped to deal with matters of mass, political, communal, violence."

497 Section 297 of the *CPA*.

498 Section 276 of the *CPA*.

499 *CSVR's Alternative Prosecution Policy Framework* par. 7(ii).

entire criminal justice system and that in the future, they can be transferable to all criminal cases.

Various programmes that could benefit the entire criminal justice system and the prosecution of past political crimes are proposed and include an independent public body or commission, diversion programmes, community service diversion, and victim-offender mediation programmes.[500]

Firstly, with regard to an independent public body or commission,[501] the CSVR draws on the *Criminal Cases Review Commission* (CCRC) model in the United Kingdom. The CCRC is an independent, publicly funded, body whose role is to administratively review possible miscarriages of criminal justice and to then take selected cases to an Appeal Court. This model, it is held, would be helpful when prosecuting *apartheid* era crimes because political interference in the prosecution process would be reviewable to a higher court, thereby protecting the interests of indigent defendants, victims and the public. In this regard, unlike the NPA and the defence, who have a direct right of appeal when a conviction or sentence is unlawful, victims/complainants/witnesses and the public have no right of judicial appeal/review. A review commission could therefore act in the public interest, and in furtherance of victims' rights, when NPA and defence decisions would likely not be upheld by an appeal court, for example when extremely lenient plea and sentence agreements are finalised.[502] This model, it is further held, could add value to the current criminal justice system as many offenders do not have adequate legal representation and/or are awaiting trial in prison without a proper review of their detention orders and sentences.

Secondly, it is proposed that diversion programmes[503] removing perpetrators from the criminal court system on certain conditions can be relevant in transitional justice contexts due to the communal nature of political violence. For example, between 1984 and 1989 some 450 people were necklaced in South Africa and this crime often involved many offenders, abettors, instigators and bystanders. Many of

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500 *CSVR's Alternative Prosecution Policy Framework* par. 7(ii)(b).

501 *CSVR's Alternative Prosecution Policy Framework* par. 7(ii)(a).

502 *CSVR's Alternative Prosecution Policy Framework* fn 34*:* "Although the court at first instance must approve the initial 'plea and sentence agreement' it may not do so judicially and therefore a review might be necessary. For example the Kenyan Section of the International Commission of Jurists (op cit 29) confirms that in Africa, 'the courts have not, and still do not always subject *nolle prosequi* requests to necessary scrutiny that would unearth improper motives.'"

503 *CSVR's Alternative Prosecution Policy Framework* par. 7(ii)(b).

these offenders, abettors, instigators and bystanders did not apply for amnesty at the TRC, and although all of these actors are criminally responsible, their culpability may differ and therefore many of them may be suitable for criminal diversionary programmes.

Thirdly and additionally, community service diversion is also suggested in cases where gross violations of human rights must be disposed of numerously, within a limited time period and within the rule of law. To illustrate the point, reference is made by the CSVR to the case of KZN[504] or *Khutsong*, where prosecutions for past acts of political violence can involve numerous alleged offenders and onlookers and there is a need to avoid a prolonged judicial intervention that can heighten community instability.[505]

Lastly, victim-offender mediation programmes, either as diversion or as complementary to prosecutions, is proposed as relevant interventions for addressing broader needs relating to healing, reintegration and truth recovery. It is recommended that where victims express an interest in direct dialogue with the perpetrator, access to such services should be facilitated by the criminal justice system.

With regard to the third proposition, namely that of community diversions and with specific reference to the situation in KZN, the *Report of the Amnesty Task Team*[506] noted that the "arms caches that have not yet been discovered and the KZN problem" are noted concerns.[507] It is estimated that as many as 20,000 people were killed from 1984 to the present in relation to political violence in KZN with more than half of the fatalities occurring after 1990 after the National Party lifted the ban on liberation movements.[508] Research indicates that current persistent political violence in KZN, that has killed more than 2,000 people since 1994, is linked to unresolved investigations into past political violence.[509] In view of the above, it is suggested that

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504 See also par. 5 Ch. 2 above and par. 2.1 Ch. 5 below.
505 *CSVR's Alternative Prosecution Policy Framework* par. 7(ii)(b).
506 Section 3.2.4 of the *Report of the Amnesty Task Team*. The Report was disclosed as part of the legal challenge in *Nkadimeng v National Director of Public Prosecutions* (32709/07) 2008 ZAGPHC 422.
507 *CSVR's Alternative Prosecution Policy Framework* par. 6 (iii)(a).
508 *CSVR's Alternative Prosecution Policy Framework* par. 6 (iii)(b). See Taylor R "Justice Denied: Political Violence in Kwazulu-Natal after 1994" 2002 *African Affairs* 473.
509 *CSVR's Alternative Prosecution Policy Framework* par. 6 (iii)(c). See Taylor R "Justice Denied: Political Violence in Kwazulu-Natal after 1994" 2002 *African Affairs* 473

should prosecutions follow in KZN they should be undertaken within a limited and defined time period so that community instability is not heightened.[510]

The afore-mentioned proposal raises concern, especially with the Argentinean version thereof in mind. By the end of 1986, the Argentinean Congress had successfully passed Law No. 23.492 (commonly known as *Punto Final* or the "Full Stop" law), which set a time limit of sixty days for the indictment of all military officials who had committed crimes during the dictatorship.[511] Clearly the "Full Stop" law was intended as an extremely short statute of limitations with the effect of precluding prosecution. Not only does this short time frame place undue pressure on the investigation and prosecution authorities, but it may also motivate actors within these authorities to stall and let the time pass without doing anything and thereby protecting perpetrators. This law was adapted to shield the authors of serious human rights violations committed during the so-called "Dirty War" (1976-1983) and because of its legal effect it is generally referred to as an "amnesty law".[512]

From a legal point of view, the Argentinean Supreme Court's decision[513] confirms the international law prohibition against applying national legal provisions such as amnesty laws, statutory limitations and the legality principle to serious human rights violations or crimes against humanity. The vague terms of the Inter American Court's judgment were used by the Argentinean Supreme Court to ground its declaration that Congress could not have constitutionally enacted the "Full Stop" law. The relevant portion of the Inter American Court's opinion reads as follows:[514]

> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

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510 *CSVR's Alternative Prosecution Policy Framework* par. 6 (iii)(d).

511 Elias JS "Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's 'Amnesty' Laws" 2008 *Hastings International and Comparative Law Review* 614.

512 Bakker AE "A Full Stop to Amnesty in Argentina: The Simón Case" 2005 *Journal of International Criminal Justice* 1106-1107.

513 *Simón Julio Héctor y otros s/privación ilegítima de la libertad*, Supreme Court, causa No. 17.768 (14 June 2005) S.1767XXXVIII.

514 *Barrios Altos* case (*Chumbipuma Aguirre et al v Peru)* Judgment of 14 March 2001 Series C, No 75 par. 41.

5.2 Judicial recognition of restorative justice

The Constitutional Court in *Dikoko v Mokhatla*,[515] a case of compensation for defamation, emphasised that in South Africa's constitutional democracy, the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another. It was emphasised that traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It was therefore suggested that a goal of the law should be to emphasise the re-establishment of harmony in the relationship between the parties rather than to increase acrimony and push the parties apart. A remedy based on the idea of *ubuntu* or *botho* could according to the court go much further in restoring human dignity and that it could indeed give better appreciation and sensitise someone as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in sentencing laws.

In their minority judgment, Mokgoro J and Sachs J held that it might have been appropriate to order an apology. Because an apology, according to the honourable justices, serves to recognise human dignity, thus acknowledging in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether or not the *amende honorable* is part of South African law, it was suggested that this area be developed in view of the values of *ubuntu* emphasising restorative rather than retributive justice. The goal should, according to the honourable justices, be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social inter-dependence. It is finally suggested that this is an area where courts should be pro-active, encouraging apology and mutual understanding wherever possible.

Another issue is that of the indigenous legal approach to punishment and the feasibility of introducing it into the criminal justice system. Indigenous law is constitutionally recognised as a system of law in South Africa[516] and in *S v*

515 *Dikoko v Mokhatla* 2007 1 BCLR 1 8 (CC) paras. 68-69.
516 Section 211(3) of the *Constitution*.

Maluleke[517] the application thereof in criminal law was explored. The accused in this case was convicted of the murder of a young person who broke into her house and the judgment revolved around the question of an appropriate sentence.

During evidence in mitigation the defence investigated the question whether or not the accused had, prior to the trial, complied with traditional custom of her community of apologising for the taking of the deceased's life by sending an elder member or members of her family to the family of the deceased. It was established that the accused had indeed not considered an apology in the prescribed manner until prompted by evidence in mitigation, but the mother of the deceased indicated that she would be prepared to receive the accused, and in particular wanted an explanation as to why the accused had killed her child.

The court took the willingness, and indeed the need of the deceased's mother to enter into a conversation with the accused, as an opportunity to involve the community and to begin to heal the wounds that the commission of the crime caused to the family of the deceased and the community at large. The recognition of the custom, and willingness of the accused to observe it, convinced the court of the suitability of the application of the new, and haphazardly applied, approach of restorative justice,[518] defined as:[519]

> ... an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime – victim(s), offender and community – to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm.

The court further highlighted the possibility of introducing customary law principles into the formal criminal justice system by way of a supple restorative justice approach.[520] The court noted that:[521]

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517 *S v Maluleke* 2008 1 SACR 49 (T).

518 See Skelton A and Batley M "Restorative justice: A contemporary South African review" 2008 *Acta Criminologica* 49 where the view is held that restorative justice has clearly emerged in South African writing, practice and jurisprudence and is here to stay. In contrast hereto, see Terblanche SS *The Guide to Sentencing in South Africa* 2nd ed (LexisNexis Durban 2007) 177 where it is pointed out that restorative justice is clearly not a central part of the current basic sentencing principles.

519 *S v Maluleke* 2008 1 SACR 49 (T) par. 28. See also Tshehla BJ "The restorative justice bug bites the South African criminal justice system" 2004 *SACJ* 17.

520 *S v Maluleke* 2008 1 SACR 49 (T) par. 30. See Batley M and Maepa T "Introduction" in Maepa T (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (Monograph no.

> Experience in Canada, New Zealand and also, in particular, in Australia has, however, shown that the introduction of traditional, indigenous legal systems into at least part of the criminal-justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing of the victims' hurts, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large. . . . There appears to be little reason why similar results could not be achieved in South Africa.

Bertelsmann J added:[522]

> Eventually, legislative intervention may be required to recognise aspects of customary law – but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into our criminal-justice system.

There are certain points of contact between restorative justice and punishment in African societies.[523] They share similar ideals such as reconciling the parties and restoring harmonious relations within the community. They recognise the practice of victim offender mediation and family group conferencing as a mechanism to fulfil those ideals. Tendering an apology is usually perceived as a possible, but not guaranteed, outcome of victim-offender mediation.[524] Victim-offender mediation is usually an option available under the broader condition of correctional supervision.

Being aware of the philosophy of restorative justice within African societies and in an attempt to address these uncertainties, the South African Law Reform Commission (SALRC) embarked on a project to reform the indigenous courts, which culminated in the *Traditional Courts Bill*.[525] Clause 10(2) spells out eleven orders a court may make after hearing the views of the parties to the dispute, including an order that an unconditional apology be made.

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111 Institute for Security Studies with the Restorative Justice Centre Pretoria 2005) 16. See also Prinsloo JH "Crime prevention in South Africa utilising indigenous practices" 1998 *Acta Criminologica* 75.

521 *S v Maluleke* 2008 1 SACR 49 (T) paras. 39-40.

522 *S v Maluleke* 2008 1 SACR 49 (T) par. 41.

523 See Skelton A *Child Justice* 231-237 for a more comprehensive investigation into the similarities and differences between traditional courts and restorative justice processes.

524 Note Braithwaite J "Principles of Restorative Justice" in Von Hirsch A *et al* (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing Oxford and Portland Orgeon 2003) 8-14 as referred to by Skelton A and Batley M "Restorative justice: A contemporary South African review" 2008 *Acta Criminologica* 39, indicating that an apology is considered most likely to emerge only after victim-offender mediation.

525 Government Gazette 30902 of 27 March 2008 *Traditional Courts Bill* [B15 2008].

Another facet of restorative justice, met in the *Maluleke* case, is reflected by the involvement of the indirect victim in the sentencing process by allowing the deceased's mother to provide information relevant to sentencing by means of an oral statement indicating the hurt and loss the deceased's family had suffered.[526]

In the ordinary course, the accused would have been doomed to imprisonment, but ultimately the accused was sentenced to eight years' imprisonment, suspended for three years on condition, *inter alia*, that she apologised according to custom to the mother of the deceased and her family within a month after sentencing.

Restorative justice as concept has received considerable recognition in recent judgments,[527] but this case is one of the first reported cases to apply restorative justice principles explicitly, and also the first to impose a suspended sentence conditionally upon an apology by the accused.

Some might argue that the sentence does not satisfy the requirement of retributive justice and that it raises issues of proportionality and inconsistency.[528] Others welcome this innovative approach, but warn that it would neither be feasible nor advisable to resort solely to custom in mitigation of sentence and incorporate traditional law *per se*, but rather to investigate each case carefully in order to acknowledge and incorporate some of the basic beliefs and values of traditional indigenous communities.

Ultimately section 2 of the *Constitution* determines that the *Constitution* is the supreme law of the Republic and that any law or conduct inconsistent with it is invalid. According to section 211(3) of the *Constitution* the courts should therefore

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526 *Service Charter for Victims of Crime in South Africa* 2004 clause 2 pertaining to *inter alia* the right for victims of crime to give information before sentencing. See also Müller K and Van der Merwe A "Recognising the victim in the sentencing phase: The use of victim impact statements in court" 2006 *SAJHR* 647.

527 See, for example, *S v Shilohane* 2005 JOL 15671 (T); *S v Shilubane* 2008 1 SACR 295; *S v Saayman* 2008 1 SACR 393 (E) and *S v Tabethe* 2009 JOL 23082 (T); 2009 2 SACR 62 (T). In view of the particular circumstances in *S v Tabethe*, the court was of the view that this case was the one rape case in which restorative justice could be applied in full measure providing a just and appropriate sentence that punishes the accused, restores the victim, helps to heal the damage done by the commission of the crime and benefits society by ensuring the rehabilitation of the offender and the rendition of community service. Instead of imprisonment, the court ordered the accused to continue supporting the victim and providing for her and her family as he did prior to the rape.

528 See Terblanche SS *The Guide to Sentencing in South Africa* 2nd ed (LexisNexis Durban 2007) 177. See also, in general, Von Hirsch A *et al* (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing Oxford and Portland Orgeon 2003).

apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law.

Another example is that of tailored remedies in the so called Equality Courts in South Africa that are courts designed to deal with matters covered by the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. This court deals with matters such as unfair discrimination, publication of information that unfairly discriminates, harassment and hate speech. The remedies available to successful parties include the following:

a) An unconditional apology.
b) An instruction to the respondent to do or not do something, or restraining an unfair discriminatory practice.
c) Payment of damages to you for actual financial loss, loss of dignity, or pain and suffering (including emotional and psychological suffering).
d) Payment of a fine to an appropriate organisation.
e) A declaratory order.

This initiative by the South African government is a strong indication that restorative justice or elements thereof are recognised as means to shift focus away from a retributive approach in an attempt to remedy a disturbed relationship between two parties.

Although the values and principles of restorative justice were explored in various contexts above, a similar approach in exploring alternatives to imprisonment can be followed in post-TRC prosecutions.

6 Conclusion

"Justice delayed is justice denied." This slogan is made true by the South African Government's lack of commitment to post-TRC prosecutions. Due to the fact that many of the *apartheid* era crimes were committed more than three decades ago, the crimes not listed under the prescription clause in the *CPA* have already prescribed. This consequence is extended to incidents of torture that can only be prosecuted as "assault" or "assault causing grievous bodily harm" under South African law and which are also subject to prescription. Had the South African Government incorporated the *Torture Convention*, which it has already ratified into

municipal law or recognised torture as part of customary international law, the crime of "torture" would arguably have been listed under the exclusions listed in the statute of limitation in section 18 of the *CPA* and consequently the incidents of torture that resulted from a climax in violence during the mid to late 1980's could still be prosecuted. In any event, the view that the statute of limitation in section 18 of the *CPA* requires an interpretation to the effect that the limitation period be regarded as interrupted during the *apartheid* era when "security forces were virtually never prosecuted and operatives were protected by a system and policy of non-prosecution" is supported here.

Ideally all perpetrators should be brought to book, but in reality a balance has to be struck between the need for justice and the recognition of the practical limitations of the criminal justice system. The prioritising strategy proposed among the identified "classes" of offenders therefore seems reasonable. It is, however, advised that a practical and realistic approach should be followed in that emphasis should rather be on "prioritising" high priority cases which can involve the prosecution of low priority cases in the build-up to or preparation of high priority cases.

Also pertaining to the proposed prioritising strategy, two contradictory suggestions, namely that state actors should be pursued over liberation movement actors and the need for even-handedness should be weighed up against each other and evaluated. Basically, the general difference between state actors and liberation movement actors, as seen above, is that state actors were the planners and facilitators of *apartheid* and liberation movement actors those who combated *apartheid*. With regard to which category should be prosecuted, the afore-mentioned differentiation gave rise to the view that liberation movement actors occupy the moral high ground and that the planners and senior facilitators should be investigated and prosecuted in advance. Clearly the situation is different in cases where acts of protest by liberation movement actors were out of proportion to the political objective they pursued. In these cases it is held that the pedestal liberation movement actors are placed on cannot be justified and that they should accordingly be treated the same as state actors. Here the principle of even-handedness makes sense and if implemented scrupulously, the government cannot be accused of pursuing "victor's justice". Again, as rightfully indicated by Pretorius, the most important consideration regarding the decision whether or not to prosecute, is the availability of sufficient

evidence and the fact that it cannot always be ensured that such evidence will be even-handed. Moreover, the result of this differentiation will undoubtedly be further polarisation while the rational underlying the national project of transformation and reconciliation is to avoid same.

The organisational and financial constraints clearly are stumbling blocks in the way of successful prosecutions and it is evident that new prosecutorial, research and support posts should be created, and that the PCLU be allocated larger premises and operational equipment, to continue to professionally handle its usually high profile responsibilities. It follows that as with the TRC, the Government should have made sufficient provision in its strategic plan and budget for post-TRC prosecutions.

The challenges the PCLU face and which are amplified by the SAPS' own organisational and financial constraints are clearly the result of a bigger problem at Governmental level. Serious consideration has to be given to swift and effective justice delivery, especially in view of the fact that many *apartheid* era crimes still remain unaddressed which poses a threat to South Africa's young and hard earned democracy. Attempts to expand and improve the specialised investigative capacity of the SAPS by, for example, the incorporation of the Hawks sound like a step in the right direction from which the PCLU can directly benefit. Regretfully though, no mention was made in the *NPA Strategy 2020* of post-TRC prosecutions as a departmental obligation or action in need of medium to long-term planning.

It is therefore necessary that strategies be developed to speed up justice delivery, but care should be taken not to create irrational shortcuts that could be counterproductive to the over arching goal of transformation in South Africa. To satisfy all stakeholders is an unrealistic goal and impossible task at that, and therefore certain compromises and sacrifices will have to be made within a legal framework and after proper consultation with all stakeholders.

As became evident from the above, a further consequence of the fact that many of the *apartheid* era crimes were committed decades ago, is that it poses substantial evidentiary constraints. Pertaining to the availability and reliability of witnesses and evidentiary material, it has firstly been established above that measures the ICTY implements under similar circumstances can also be applied in South African courts.

With regard to the evidentiary constraint posed by section 31(3) of the *PNURA*, it has been determined that the suggestion made by Bennun to overcome such cannot succeed and consequently the record of findings by the TRC cannot constitute incriminating evidence available to a criminal court hearing cases arising from human rights violations. In line with the legal analysis and policy considerations in a "Briefing Paper" on the relationship between the Sierra Leonean Special Court and Sierra Leonean Truth and Reconciliation Commission, the view is supported here that information received by the TRC would not be such that it may be admissible as evidence before a court of justice for the proceedings before the TRC were not "judicial" and the information received by the TRC was consequently not tested by cross-examination.

It has, however, been established that standard arrangements in the normal execution of justice and the prosecuting mandate, which are accommodated in existing legislation, such as plea and sentence agreements, and indemnity agreements in terms of which incriminating evidence by co-accused turned state witness for the prosecution are exchanged for indemnity from prosecution, can successfully be implemented to alleviate the consequences of such constraints.

In exploring an appropriate sentencing framework for post-TRC prosecutions, it has been established above that ordinary sentences in terms of the existing sentencing framework are not appropriate in the context of transformation and reconciliation. The suggestions made in this regard by the CSVR are supported here, especially to the extent that it calls for a victim-centred approach within a restorative justice framework which allows for alternatives to imprisonment. The benefit of the afore-mentioned is twofold. Not only does it address the overcrowding of South African prisons and the negative effects thereof, but at the same time it also gives meaning to "justice" for victims in the sense that sentences can be tailored to an extent that better suit their needs. In this regard, the judicial recognition of restorative justice and the indigenous legal approach to punishment and the feasibility of introducing it into the criminal justice system are significant. South Africa is a multicultural country made up of various traditional indigenous communities each with their own customs and beliefs. To incorporate traditional law *per se* and resort solely to custom in mitigation of sentence would clearly not be feasible or advisable. The suggestion that particular circumstances surrounding

each case should be investigated carefully in order to acknowledge and incorporate some of the basic beliefs and values of traditional indigenous communities, is supported and it is suggested here that the above be extended to post-TRC prosecutions.

In the 1994 context, the hardships South African courts would encounter in dealing with the atrocities of the *apartheid* system are summarised by Judge Goldstone as follows:[529]

> There would be too many accused and adequate punishment would be too costly in human, political, as well as financial terms. Even if we had the means and the financial resources, it would not be a sensible or practical route to follow. Criminal trials are unpleasant both for the accused and the accuser. The technicalities and time necessary to ensure a fair trial are themselves a source of tremendous frustration.

Admittedly, the South African justice system is still to a large extent in the same predicament with regard to its capability of dealing with the *apartheid* past. Care should, however, be taken by South Africa not to stare itself blind to this challenge and run the risk of making it into a self-fulfilling prophecy. The identified challenges mentioned in this Chapter should rather be admitted and the suggested solutions considered, for that is the only way forward.

529 Parker P "The politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid without Forgetting" 1996 *Human Rights Law Journal* fn 81. See also Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (Berliner Juristische Universitätsschriften Strafrecht Band 29: Berliner Wissenschafts-Verlag 2006) fn 46.

CHAPTER 5

THE SPECIAL DISPENSATION ON PRESIDENTIAL PARDONS

1 Introduction

The Minister of Justice disclosed in a press statement, dated 7 January 2007, the need for the development of a policy on Presidential pardons for prisoners who alleged that their offences were committed with a political objective. According to the Minister of Justice, the matter was complex and, since there was no legal precedent, a political solution was required. The Minister of Justice noted the following:

a) Some of the applicants for pardons had failed to utilise the TRC processes that were available to them because their political parties did not support the TRC.

b) Some of the applicants pleaded ignorance of the TRC processes.

c) Offences some of the applicants were alleged to have committed took place after the cut-off date for TRC amnesty applications.

Months later at a joint sitting of Parliament on 21 November 2007, President Mbeki formally and publically announced the Special Pardons Process, which as mentioned above,[530] was established for dealing with pardon requests made by people convicted for offences they claim belong among the category of offences that were considered by the Amnesty Committee, namely offences committed with a political objective, and who were not denied amnesty by the Amnesty Committee.[531] According to President Mbeki, the aim was to assist the nation in resolving the "unfinished business" of the TRC. President Mbeki stated as follows:[532]

> As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this 'unfinished business'.

530 See par. 1 Ch. 1 of this book.
531 The President's address made on 21 November 2007.
532 The President's address made on 21 November 2007.

President Mbeki assured members of Parliament that the new process would be consistent with what the nation sought to achieve through the TRC and that it would not undermine the work of the TRC but would instead build upon its legacy.

It was further said to be important that pardon requests were dealt with in an open and transparent manner, uniformly and rationally in strict compliance with pre-determined procedures and criteria. The Explanatory Memorandum dealing with the Special Pardons Process stated that in considering the applications, the President would:

a) be guided by the principles and values which underpin the *Constitution*, including the principles and objectives of nation building and national reconciliation; and

b) uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the TRC, especially as they relate to the amnesty process.

The Special Pardons Process would ultimately support the discharge of the President's constitutional obligation to consider pardon applications in terms of section 84(2)(j) of the *Constitution*. President Mbeki also made it clear that he is under no obligation to grant pardons.

In order to entrench the practice the nation has sought to cultivate, of acting in unity as it addresses the crimes of the past, President Mbeki asked each political party represented in Parliament to appoint a representative to serve on the Reference Group which, as mentioned above,[533] was charged with considering pardon applications and submitting recommendations to the President in a manner that contributed to the ideal of reconciliation by advising the President in a spirit of even-handedness and justice on an equal basis.[534] The multi-party Reference Group was formally constituted on 18 January 2008 at its first meeting with President Mbeki, during which the Terms of Reference (ToR) were adopted and Dr. Tertius Delport was elected as chairperson. President Mbeki indicated that he

533 See par. 1 Ch. 1 of this book.
534 Confirmed at its first full meeting on 6 February 2008. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 90.3.

would not be bound by the advice of the Reference Group, but would give serious consideration to its recommendations.

President Mbeki announced a window of opportunity for new pardon requests that would open on 15 January 2008 and close on 15 April 2008, later extended to 31 May 2008. Requests would only be considered from applicants convicted of political offences committed during the period up to 16 June 1999, but not from applicants denied amnesty by the TRC. President Mbeki's professed hope was, as indicated earlier, that the Reference Group would enable him to complete the "unfinished business" of the TRC.

On 16 January 2008, the Office of the President released a press statement announcing the beginning of the period of applications for Presidential pardons for alleged political offences in accordance with President Mbeki's announcement in Parliament on 21 November 2007. The press statement mentioned that such persons will be considered for "amnesty". It was noted that reference was made to "amnesty" rather than "pardons" on more than one occasion in the press statement which was said to confuse the purpose of the process and, intentionally or unintentionally, imply a re-run of the TRC instead of a separate process to address the "unfinished business" of TRC.

At the outset, the scope of the Special Pardons Process with reference to its ToR will be established, where after the objections thereto will be highlighted. Focus will be on the main objection to the Special Pardons Process, namely, the apparent lack of victim consultation and participation, which gave rise to a challenge on its constitutionality. The question was whether or not victims had a right to be heard in terms of section 84(2)(j) of the *Constitution* and consequently whether or not the President had an obligation to include victims in the process before coming to a decision. To answer this question, the source, nature and extent of the President's pardoning power came under the loupe. It was argued that the pardoning power constitutes an executive power in the form of administrative action in terms of section 33 of the *Constitution*, read together with section 1 of *PAJA* in which case the author of an administrative act is obliged to afford parties affected by its decision (victims in this case) an opportunity to be heard. Alternatively, it was submitted that even if the pardoning power was found not to be administrative action, the President had in any event a duty to include the victims, based on the common law duty to act

fairly by keeping to his "self imposed benchmark" or "commitment" to adhere to the same values and principles that underpin both the *Constitution* and the TRC recognising the right of victims to be heard.

The primary question was not whether or not Presidential pardons in terms of section 84(2)(j) of the *Constitution* through the Special Pardons Process was an appropriate and constitutionally sound mechanism to deal with the "unfinished business" of the TRC. In his justification of his decision to use his pardoning power, President Mbeki said that he considered all his options including amnesty and indemnity laws, and that none of the laws were applicable due to their expiration.

After the various legal challenges have been addressed two recent Constitutional Court judgments, those of *Chonco* and *Albutt,* will further be drawn on to establish the current legal position on Presidential pardons in the context of this study. Finally, Presidential pardons in Argentina and the consequent declaration thereof as unlawful after scrutiny by various international bodies will be investigated as part of a comparative legal analysis. In conclusion the approach followed in Argentina will be explored in the South African context.

2 Challenge on the constitutionality of the Special Pardons Process

The coalition[535] brought an urgent application for an interdict before the Gauteng North High Court to prevent the President[536] from granting pardons pending the final determination of the matter. The President was cited as first respondent and the Minister of Justice[537] as second respondent.

535 As mentioned in Ch. 1 of this book above, "coalition" will be used throughout the text to refer to the applicants in the *interim* court application (respondents in the appeal proceedings).

536 The President as first respondent in the *interim* court application (applicant in the application for leave to appeal to the High Court and respondent in the application for leave to appeal to the Constitutional Court) will be referred to as the President, be it former President Mbeki or deputy President/acting President Mothlante

537 The same principle as with the President above applies to the Minster.

During the proceedings, Mr. Albutt[538] along with six other parties[539] joined the application as interveners. In 1995, they were convicted of culpable homicide, public violence and assault with intent to cause grievous bodily harm for their attacks on black people. At the time they were members/supporters of the Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement, hereinafter referred to as the AWB). Currently, they are serving their sentences in prison and are applicants under the Special Pardons Process with an obvious interest in the speedy finalisation of the matter.

2.1 The scope of the Special Pardons Process

The preamble to the ToR[540] sets out the context and rationale for the Special Pardons Process. From this it is clear that the Special Pardons Process was intended to bring closure on matters relating to the convictions of those persons who allegedly committed offences in pursuit of political objectives.

Since the earlier laws providing for amnesty and indemnity, namely the *Indemnity Act* 35 of 1990, the *Further Indemnity Act* 15 of 1992 and the *Promotion of National Unity and Reconciliation Act* 34 of 1995, have lapsed and can no longer be utilised and since the President considered all other relevant statutory provisions, and did not find any existing measures suitable to deal with the specific matter at hand, the President decided to use his constitutional power of pardon in terms of section 84(2)(j) of the *Constitution* and to set up the Special Pardons Process to assist him in this regard.

The President accordingly established a Reference Group consisting of representatives of political parties in terms of section 1 of the ToR. The responsibilities of the Reference Group are set out in section 2 and include:

a) Receiving all screened applications for pardon from the DOJ&CD.

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538 The first intervener (eight respondent in the application for leave to appeal to the High Court and applicant in the application for leave to appeal to the Constitutional Court will be referred to as the first intervener where reference is made to his affidavits or heads of argument in isolation.

539 Gerhardus Johannes Taljaard, Alender George Whitehead, Arend Christiaan de Waal, Willem Jacobus Petrus Jacobs, Hans Jacob Wessels and Reyno Adriaan Rossouw. Where the views of these six interveners correlate to that of the first intervener reference will be made to them in the collective as "the interveners".

540 A copy of the terms of reference is annexed hereto marked "?".

b) Ensuring that each application for pardon is completed in the prescribed manner.[541]

c) Considering each application for pardon and making recommendations to the President.

Under section 2, the Reference Group was also required to develop its own rules and procedures and communicate it to the DOJ&CD which was, in terms of section 3, required to provide administrative support to the Reference Group. Sections 4 to 6 further deal with general administrative arrangements.

Section 7 sets out who qualifies for a pardon under the Special Pardons Process and they are persons who:

a) were convicted and sentenced solely on account of allegedly having committed politically motivated offences before 16 June 1999, the date of the inauguration of President Mbeki;

b) comply with the pre-determined criteria and procedures as set out in the application form;

c) attach an affidavit deposed by a person authorised by a political party, liberation movement or body, in which it is confirmed that the act or omission which constituted the offence occurred under the instruction of, or in the execution of an order, plan or project, or on behalf of, or with the approval of, or in furtherance, promotion or achievement of the policies, objectives or interests of, the organisation of which the applicant was a member, agent or a supporter.

Section 8 disqualifies offenders whose earlier applications for amnesty to the Amnesty Committee under the *PNURA* were refused.

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541 On 24 January 2008, the Department of Justice and Constitutional Development announced that the twelve page pardon application forms were available to interested applicants at all courts, correctional facilities, Department of Justice regional offices, and websites. A copy of the application form is annexed hereto and marked "?". The application form was, however, never published in the *Government Gazette*.

A target group includes a large number of members/supporters of the IFP which, as mentioned above,[542] did not recognise the legitimacy of the TRC and hence did not participate in its proceedings. The Special Pardons Process was therefore an attempt to, amongst others; address the consequences of the political unrest in KZN which proceeded long after the democratic transition in 1994.

Section 9 permits applications to be made by individuals and it allows for political parties to submit applications to the DOJ&CD on behalf of such individuals.

Section 10 requires that all recommendations made in respect of applications for pardon be submitted to the President and that each recommendation made by the Reference Group reflect the majority as well as the minority views of its members.

In terms of section 11, the granting of a pardon to an applicant would lead to the expungement of his or her conviction, sentence and criminal record in respect of the crime/s for which he or she is granted pardon.

2.2 Objections to the Special Pardons Process

The coalition relied heavily on the principles and values that underpinned the TRC and used it as gauge against which they evaluated the Special Pardons Process. On the one hand they were troubled by the similarities between the two processes, but on the other hand they criticised the Special Pardons Process for not underwriting the same principles and values as the TRC did.

For the reasons set out below, the coalition submitted that the Special Pardons Process and its implementation were unjust and unfair to the victims of perpetrators who failed to take advantage of the TRC process.

The Special Pardons Process was held to be an effective re-run of the TRC's amnesty process. Firstly, because the key criteria for the recommendation of a pardon under the Special Pardons Process as set out in the application form mirror the amnesty criteria contained in section 20 of the *PNURA*. The following table illustrates the point made by the coalition:

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542 See par. 1 Ch. 1 of this book.

TABLE IV

Pardons application form	Section 20 *PNURA*
Paragraph 3.4(c) "What were the political objective, if any, you sought to achieve by committing the offence(s)?"	Section 20(1)(b) "...the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past..."
Paragraph 3.1.2 "Why was the offence(s) committed?"	Section 20(3)(a) "...the motive of the person who committed the act, omission or offence;"
Paragraph 3.4(a) "Was the offence(s) committed in the execution of an order of, the approval of, or authorized or in terms of a policy of an organisation, by a political party or organization, institution, liberation movement or body and if yes, state the name of the political party, organisation; institution, liberation movement or body:"	Section 20(3)(e) "...whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter;"
Paragraph 3.3(a) "Did you benefit personally in any way by committing the offence(s)?"	Section 20(3)(f)(i) "...but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted - for personal gain..."

Secondly, because in effect and outcome, the Special Pardons Process was held to differ only in form from the TRC's amnesty regime. A decision to pardon was said to have the same practical effect as a decision to grant amnesty, namely that a criminal record is expunged and the perpetrator in question is released from any penalty imposed upon him or her.

The President denied this allegation by pointing out general "fundamental differences" between a pardon and an amnesty,[543] which differences were held by the coalition to be subtle and not convincing.[544]

The President argued that the ToR make it clear that the Special Pardons Process is not and was never intended to be a continuation of the work of the Amnesty Committee. The President specifically relied on paragraph 2 of the preamble to the ToR which determines that the mechanisms provided for in a number of statutory provisions, including the *PNURA*, have expired, and can no

543 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit paras. 5.3 and 10.

544 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 21.

longer be utilised.[545] In return the coalition held that the President failed to draw the natural conclusion from the said paragraph, namely that if the amnesty provisions were still in force they would have been used, which was held to be a clear indication of the President's intentions. Above all the coalition referred the court to President Mbeki's address to the joint sitting of Parliament on 21 November 2007 where he announced the Special Pardons Process for dealing with pardon requests made by "*people convicted for offences they claim were politically motivated*" to resolve the "*unfinished business of the TRC*".

A critical aspect of South Africa's transition was the so-called "constitutional compact" struck with victims in terms of which the postscript to the *interim Constitution* specifically allowed for a once-off conditional amnesty. This required victims to endure a severe limitation of their fundamental rights in relation to justice in order to advance national unity and reconciliation. This "constitutional compact" required the state to prosecute deserving cases in respect of offenders who had not applied for amnesty as well as those who had applied, but to whom amnesty was not granted. Another direct implication of the compact was that already convicted perpetrators would face the consequences thereof and would retain their criminal records and serve out their sentences.

It was the coalition's contention that the Special Pardons Process violates the "constitutional compact" by providing the possibility of the expungement of criminal records and release from criminal sentences to those who committed serious crimes during the *apartheid* era and beyond, and who did not apply for amnesty before the Amnesty Committee. The Special Pardons Process was therefore said to undermine the very fabric and design of the TRC process and in so doing disavows the very foundations of South Africa's democracy. The extension of the cut-off date of politically motivated cases to be considered from the TRC cut-off date of 11 May 1994 to 16 June 1999 was further held to stand as a betrayal of the TRC process. The Special Pardons Process was accordingly held to be in breach of the "constitutional compact" and as a consequence of which, aspects thereof were held to be unlawful.

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545 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit paras. 26 and 26.2.

The coalition went further and held that the Special Pardons Process was not sanctioned by the *Constitution* or by any legislation and therefore provided no authority for the suspension of the rule of law or the denial of the rights to justice of victims[546] through any other similar programme. In contrast hereto, it was highlighted that the TRC was constitutionally mandated in terms of the postscript to the *interim Constitution* which authorised an amnesty process through the establishment of mechanisms, criteria and procedures, all regulated by the *PNURA*, in order to achieve the objectives of national unity and reconciliation. Accordingly the suspension of the rule of law and the rights of victims to justice, as provided for in the *PNURA*, was authorised by the *interim Constitution*.

The Special Pardons Process was also criticised for not containing any of the safeguards provided for in the TRC process. The following objections with regard to the Reference Group and the Special Pardons Process itself (principles and values that underpinned the TRC, but were not underwritten by the Special Pardons Process) were raised:

a) Failure to disclose rules and procedures.

b) Failure to clearly define the category of "politically motivated offences".

c) Lack of full disclosure by pardon applicants.

d) Lack of public disclosure and procedural transparency.

e) No independence or objectivity and tainted with bias.

f) Glaring lack of victim participation and consultation.

Although victim participation as such does not form the main subject matter of this study, reference will be made thereto, but limited to the extent that it is relevant to the main issues raised in this chapter since the "glaring lack" of victim participation and consultation in the Special Pardons Process was heavily relied upon and formed the basis of the coalition's challenge. The President, however, held that there is no right to a hearing on the part of a third party, including a victim in a pardon application in terms of section 84(2)(j) of the *Constitution*.[547] The first intervener

546 See par. 2.3.2 of this Ch. below.
547 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit par. 9.

concurred with the President on this point and referred to case law in support of his contention.[548] The coalition denied the argument that because section 84(2)(j) of the *Constitution* is silent on the right of victims to be heard in a pardon application, such as the Special Pardons Process, it follows that there is no such right in that process.[549] The coalition submitted that while usually third parties have not been granted hearings or the opportunity to make representations in the exercise of the pardoning power, it does not follow that this applies in all contexts.[550] The nature and extent of the responsibilities and obligations of the President under section 84(2)(j) of the *Constitution* was argued not to depend only on the language of the provision itself, but also on the factual, constitutional and historical context of the particular pardon process.[551] In particular where the President chooses to set up a process:[552]

a) for the purpose of promoting healing and national reconciliation and completing the "unfinished business" of the TRC;

b) as a substitute for the TRC's amnesty process which has lapsed and therefore cannot be used;

c) in which perpetrators and political organisations are invited to make representations in relation to the purported political motive and objective behind the crime in question;

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548 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 CC; *Chonco v Minister of Justice and Constitutional Development* (TPD case no 21224/2007), *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC); 1996 8 BCLR 1015. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument paras. 47, 48 and 77.

549 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 73.3.

550 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 20.3.

551 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 20.4.

552 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 20.5.

d) in which a body of persons has to consider and determine whether the truth has been told in order to qualify for a pardon recommendation on "political" grounds; and

e) in which the rights of victims will be undermined or infringed.

Based on the above, it was submitted by the coalition that victims not only have a legitimate expectation that they will be able to participate in such a process, but they have a right, protected and upheld by the *Constitution*, to do so.

The first intervener held that it is a necessary consequence of the coalition's analysis that the President is called upon to discriminate between pardon applicants whose crimes were politically motivated and those whose crimes were motivated by other considerations. Such an approach was said to offend against section 9 of the *Constitution*.[553] The coalition, however, pointed out that:

> ...it is well-established in our legal system and in others that what will constitute fairness in a particular case will depend on the circumstances of the case.

In "bulk" pardons like in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 CC for example, the victims could make little or no contribution to the decision-making process. In such cases, it might well be that fairness would not require granting victims an opportunity to make representations, because of the limited (and somewhat mechanical) factors to be considered in the decision, the nature and purpose of the decision, and the need to promote efficient administration. It further does not involve the consideration of the particular circumstances of the individual prisoners and the circumstances under which, and the reason why, they committed their offences. The coalition averred that while a decision to grant a pardon in such cases remains administrative action, different considerations would apply in determining what would constitute a fair procedure for making the decision.

The coalition did indeed challenge section 84(2)(j) of the *Constitution* in the specific context and not in general, but the underlying principle challenged remains the lack of victim participation and consultation, be it in a specific context or in general. The court will, in any event, decide upon the constitutionality of the issue at hand and should the court find it to be unconstitutional it has the authority to extend

553 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 87.

the remedy it deems fit to pardons and remissions in general. This would, according to the coalition, be a salutary development in law.[554]

In the spirit of comparing the Special Pardons Process with other processes, the coalition went as far as drawing a parallel between pardon and parole applications by citing *Derby-Lewis v the Minister of Correctional Services and Four Others* (Case No. 54507/08 [unreported]), where in the context of parole applications, the court recognised the right of a relative of a victim to make representations and attend board meetings. The court further observed that before a prisoner can be placed on parole, all possible relevant information should be considered and that the Parole Board has a duty to weigh and consider such information.[555]

Based on the above, the coalition submitted that, in the context of pardon applications, there is no conceivable reason why or basis on which the rights of victims which were infused into the TRC Amnesty proceedings as well as parole proceedings should be sacrificed in the Special Pardons Process.[556]

Since qualifying persons who apply for a pardon would have been tried, convicted and sentenced by a court in open proceedings, the President averred that victims would possibly have been entitled to be present and participate in those proceedings where their rights and interests, such as there may be, have already been taken into account. Furthermore, victims would not have been prohibited from instituting a civil claim against that offender if such legal recourse would have been available to them in terms of the law.[557]

The coalition rejected this way of reasoning and showed the court on the difference between the questions before a court in criminal proceedings and those before the President in a pardon application. It was denied that victims are entitled to participate in criminal proceedings before a court, aside from observing those proceedings. While a prosecutor may call victims as witnesses during trial or to give

554 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument 161.

555 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 100.

556 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 101.

557 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit paras. 15, 16 and 32.1.

evidence in sentencing proceedings, they have no right or entitlement to do so. Therefore, the coalition submitted that the limited rights enjoyed by victims in criminal proceedings, and the right to institute civil claims, can never justify their total exclusion from the Special Pardons Process.

What is vital in both trial and pardon processes, according to the coalition, is that the court and the President should be guided by all relevant factors, including the views of victims. On this point the President did concede that he would be required to and would formulate an independent opinion on the basis of the facts and information placed before him. The coalition held that in the present circumstances he is in no position to do so since the facts and information before him are one sided. Given that the only representations before the Reference Group and the President were from perpetrators, as endorsed by political organisations, there were no facts and information from any other parties to:

a) confirm or rebut claims made by perpetrators that the crimes in question were indeed motivated by a political objective and not some other criminal purpose;

b) confirm or rebut the truthfulness of the disclosures made by perpetrators;

c) comment on the circumstances in relation to the possible egregious nature of the crime and make representations on the appropriateness of issuing a pardon;

d) present a first-hand account of the harm caused by the crime; and

e) highlight the implications and impact of the issue of a pardon on identified individuals and communities.

The President tried to assure the court that despite the fact that the Reference Group did not take into account any representations from victims which they may have wished to place before them, it does not necessarily mean that he is precluded from taking them into account.

The coalition accepted that the President is not precluded from taking representations from victims. It was, however, pointed out that the President had already specifically declined to take such reasonable steps in relation to victims.[558] This was said to be clear from his refusal to require the Reference Group to take into account the relevant facts and information of victims and more particularly the withdrawal of his written undertaking of 9 December 2008 not to issue pardons without taking such steps by declaring that the process was "regular".[559]

In the light of this indisputable background and based on the President's own version, that had it not been for this legal action he would have already disposed of the remaining applications, it was held to clearly indicate that he had no intention of taking representations from victims.[560]

Another attempt made by the President to save the day in court was to say that if a particular victim had sought to make representations directly to him, he would have afforded such a victim an opportunity. The coalition held this to be of little practical value, in that victims, due to the process operating in secrecy and behind closed doors, did not know that their rights might be affected by the granting of a pardon, and that they have the right to make representations in this regard.[561] No victim would know whether the offender whose crime affected him or her had applied for or been recommended for pardon; nor would he or she know the motivation provided in the relevant application; nor would he or she know what claims had been made therein. In short, therefore, no victim has been in any position to make sensible representations.[562]

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558 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 80.

559 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) paras. 81 and 84.

560 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 81.3.

561 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 86.

562 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 87.

An interesting take on victim participation and consultation by the first intervener was that victims in a particular case may actually wish the pardon applicant to be granted a pardon and argued that it was the case with them.[563] They held that the coalition themselves made no effort to consult victims and ascertain their wishes.[564] Based on this, the first intervener was of the opinion that the coalition was indifferent to the facts that the first intervener has demonstrated that he has involved victims by meeting with them and that he has secured support of both the AWB and ANC for his application.[565]

Apart from denying that the first intervener consulted with all his victims, the coalition also objected to the consultations that allegedly took place in that there was no record to reveal what was said during such consultations and consequently it cannot corroborate the allegation or be used to back the first intervener's claim. Furthermore, the coalition denied the contention that the wider community supports their pardon application. The coalition also reiterated that to date, they only have a list containing little more than the names of the pardon applicants, but do not know which of the pardon applicants have been recommended for pardon[566] and consequently remain entirely ignorant as to which victims will potentially be affected.[567]

The first intervener could not assume that all victims have no wish to participate or have no objection to a pardon being granted by referring to one or two examples where it is, according to them, the case. It follows that this assumption cannot be used as justification for a process which excludes victims who do have a wish to participate and who have objections to the grant of a pardon. If the coalition's approach is followed it will at least give each victim the choice to participate and provide a platform from where it can be done. Should a victim decide not to participate or has no objection to the pardon application, he or she can make it known and in so doing the first intervener will not be prejudiced. Clearly, the only

563 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 53.

564 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 57.

565 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 58.

566 According to the Chairperson of the Reference Group, Dr. Delport, they have considered 171 applications of which 16 have been recommend to the President for Pardon.

567 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Replying Affidavit to the Affidavit of Paul Snaid 18, 20 and 21.

motivation behind the first intervener's argument is hasty release from prison based on the right to freedom and an expeditious legal process[568] on which the coalition replied and said that the fact that the first intervener has had to face the consequences of his brutal crimes, can never shift the balance of convenience in his favour.[569]

The coalition then highlighted principles and values that ought to have guided the Special Pardons Process. Firstly, the TRC's reservations in connection with certain Presidential pardons that had been issued. In particular the TRC stated that any further amnesty or pardons should not undermine the rationale of the TRC or its work. In the recommendations of the TRC, the following was stated:[570]

> 32. The Commission therefore recommends that in the event that the President is considering a further amnesty provision, the following should be taken into account:
>
> a that the rationale for establishing the Commission should not be undermined and that the value of its work should not be compromised through such a process;
>
> b that real reconciliation comes from facing the demons of the past honestly and demanding truth and accountability, and
>
> c that victims should not be 'revictimised' and that any amnesty should take into account their needs and their right to the truth and full disclosure and ultimately reparation.
>
> 33. The Commission is thus of the view that any amnesty and pardon must make provision for the rights of victims and maintain the constitutionality of our new state based on disclosure and a respect for the human rights of all.

Secondly, the principles and values the President committed himself to in his address to the joint sitting of Parliament on 21 November 2007, the so-called "self imposed benchmark", had to be adhered to. In their consideration of applications and recommendations to the President, the Reference Group did, however, expressly reject all of the above.

The President seemed troubled by what he referred to as the coalition's claim that the implementation of the Special Pardons Process must comply with the safeguards that were provided for in the assessment of applications for amnesty, in terms of the *PNURA* in order to be lawful and constitutional. One of the safeguards

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568 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 39.

569 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Replying Affidavit to the Affidavit of Paul Snaid 40.

570 TRC Report 2003 vol. 6, s 5 Ch. 7 paras. 32-33. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 92.

heavily relied upon by the coalition was that victims of criminal conduct for which pardons were applied in terms of the Special Pardons Process ought to have been given an opportunity to make representations to the Reference Group, and a failure to afford them such an opportunity renders the entire process unconstitutional.[571] The President held that the coalition cannot impose obligations or stipulations that the *Constitution* has not done on the President as he discharges this duty[572] and the first intervener held that the coalition simply has no right to prescribe to the President how he must develop and implement policy in this sensitive area.[573] In rebuttal the coalition confirmed that they can do just that and based this claim on the President's commitment to comply with the safeguards provided for in the *PNURA*.

2.3 Legal challenges

The objections to the Special Pardons Process formed the basis of the challenge set out in detail below.[574] In their notice of motion, the coalition in Part A thereof, was seeking an *interim* order in the following terms:

> The first respondent is interdicted from granting any pardon in terms of the 'Special dispensation on Presidential pardons for political offences' until such time as the proceedings described in Part B below have been finally determined.

In Part B, the coalition was seeking a final order in the following terms:

1. The first respondent is interdicted from granting any pardon in terms of the 'Special dispensation on Presidential pardons for political offences'.
2. (Alternatively to paragraph 1) The first respondent is interdicted from granting any pardon in terms of the 'Special dispensation on Presidential pardons for political offences' unless and until the victims of the offence(s) in question and other persons who were affected by such offence(s):
    2.1. Have been given access to the relevant application for a pardon and the proceedings and recommendations of the Pardons Reference Group in that regard; and

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571 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit par. 7 (first par. 7).
572 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit par. 42.
573 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 81.
574 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09).

2.2. Have been given an opportunity to make representations in that regard to the first respondent.

With regard to the pardoning power, the President submitted that he has unfettered discretion to carry out his constitutional obligations as he deems fit.[575] The coalition, on the other hand, submitted that the President, in exercising his pardoning power, is constrained by the prescripts of the *Constitution*.[576]

In support of the coalition's submission, they referred to *Chairperson of Constitutional Assembly, Ex parte: In re Certification of Constitution of the RSA* 1996 4 SA 744 (CC) where the Constitutional Court held that the pardoning power of the President was originally derived from royal prerogatives. The court, however, held that regardless of the historical origins of the concept, the President does not derive this power from antiquity but from the *Constitution* itself. Accordingly, should the exercise of the power in any particular instance be such as to undermine any provision of the *Constitution*, that conduct would be reviewable.[577]

The coalition further cited *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) in which the Constitutional Court considered the nature of the pardoning power granted to the President by section 82(1)(k) of the *interim Constitution*.[578] The court confirmed that the pardoning power of the President is a constitutional power[579] and against this background found that whether the President is exercising constitutional powers as head of the executive (that is the Cabinet) or as Head of State, he is acting as an executive organ of government.[580] Originating as they do from an executive organ of State, acts of the President, under section 82(1), are subject to the provisions of chapter 3 of the *interim Constitution*.

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575 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) judgment par. 7.3.

576 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 71.

577 *Chairperson of Constitutional Assembly, Ex parte: In re Certification of Constitution of the RSA* 1996 4 SA 744 (CC) (also known as the *First Certification* case) par. 116. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 72.

578 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par. 5, *Chonco v Minister of Justice and Constitutional Development* 2008 4 SA 478 (T). See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 73.

579 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par. 8. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 74.

580 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par. 11. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 75.1.

As a result the exercise by the President of his powers under section 82(1) is subject to review by courts of appropriate jurisdiction in the same way as the exercise by him of other constitutional powers would be subject to review.[581]

Based on the above, the coalition made it clear that in the exercise of his constitutional power to grant pardons, the President is obliged to adhere to all of the terms of the *Constitution* including the provisions of the Bill of Rights.[582]

It is implicit in the *interim Constitution* that the President will exercise that power in good faith. If, for instance, the President were to abuse this power by acting in bad faith, there is no reason why a court should not intervene to correct such action and to declare it to be unconstitutional.[583]

The coalition clarified its stance even further by stating that the question is whether or not the President may grant a pardon in a manner which is inconsistent with the above. They conceded that the President may choose how interested parties are to participate in the process – for example through a reference group process, through another process established by him, or through making representations directly to him. What he may not do, it has been submitted by the coalition, is to grant a pardon under the Special Pardons Process without giving victims a fair opportunity to be heard.

The coalition submitted that the Special Pardons Process is in breach of the following:

i) The right to fair administrative action and the common law duty to act fairly.

ii) The right to human dignity.

iii) The right to equality.

iv) The rule of law.

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581 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par. 13; *Chairperson of Constitutional Assembly, Ex parte: In re Certification of Constitution of the RSA* 1996 4 SA 744 (CC) par. 116. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 75.2.

582 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par. 49. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 75.3.

583 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par. 29. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 75.4.

v) The right to freedom of expression and access to information.

2.3.1 Administrative action and the common law duty to act fairly

2.3.1.1 The right to fair administrative action

The decision of the President to establish the Special Pardons Process in a manner that excluded victim participation and consultation, alternatively his failure to insist on the inclusion of victim inputs in the Special Pardons Process, was challenged on the grounds that it is inconsistent with the provisions set out in section 33 of the *Constitution* and *PAJA*.[584]

Based on the above, the first intervener simplified the applicant's case by holding that all the alleged violations arise from the single proposition that the Special Pardons Process does not provide for a right to be heard by victims. Accordingly, if it is held that there is no such right, it follows that there was no unconstitutional or unlawful conduct on the part of the President and the application must fail.[585]

The coalition submitted that the President's pardoning power in terms of section 84(2)(j) of the *Constitution*, including any process the President may put in place to facilitate decisions, constitute "administrative action" within the ambit of section 33 of the *Constitution* and even if it was found not to be the case, that in any event it constitutes "administrative action" in terms of *PAJA* and as a consequence subject to the requirements of the said provisions.[586]

The definition of "administrative action" in terms of section 33 of the *Constitution*, read together with the definition of "administrative action" in section 1 of *PAJA*, as described above,[587] was therefore relied on to determine whether or not the exercise of the President's pardoning power constitutes "administrative action".

More specifically, the coalition relied on section 1(b)(aa) of *PAJA* which expressly excludes the exercise of executive powers or the performance of the

584 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 126.

585 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 2.

586 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 80; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument 141.

587 See par. 4.5.3 Ch. 3 of this book.

functions of the National Executive from the ambit of "administrative action". These exclusions are specifically listed with reference to relevant sections of the *Constitution* of which section 84(2) is particularly relevant. Significantly the relevant provision dealing with the pardoning power of the President, namely section 84(2)(j) does not appear on the list of exclusions and is therefore not expressly excluded from the definition of "administrative action".

Hoexter is of the opinion that it should not be assumed that the non-exclusion thereof makes it administrative action *per se*.[588] Burns and Beukes, on the other hand argue that it does.[589]

In line with Burns and Beukes, the coalition contended that the non-exclusion is the clearest possible indication that the legislature intended that the granting of pardons constitutes administrative action.[590] They referred to the judgment in *Minister of Health NO v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) which demonstrates that this is an appropriate way to determine the meaning of "administrative action". In this case, the court considered whether or not the making of regulations constitutes "administrative action". In order to answer this question, the court considered the exclusions from the definition of "administrative action" in section 1 of *PAJA* relating to the President's executive authority under section 85 of the *Constitution* and found the omission of the relevant subparagraph, namely (2)(a), from the specified list of exclusions significant.[591] By the same reasoning, the coalition argued that the omission of the granting of pardons from the list of exclusions is significant. They further held that the omission could hardly have been by accident and that it must have been deliberate and must therefore be given some meaning. The coalition concluded by suggesting that the way to do so is to conclude that the granting of a pardon constitutes administrative action.[592]

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588 Hoexter C *Administrative Law in South Africa* (Juta Cape Town 2007) 210.

589 Burns Y and Beukes M *Administrative Law under the 1996 Constitution* 3rd ed (LexisNexis Butterworths Durban 2006) 114-115.

590 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 83.

591 *Minister of Health NO v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC). See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 84.

592 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 85.

The grounds on which the coalition sought to challenge the Special Pardons Process are briefly set out below:[593]

a) Section 6(2)(f)(ii) of *PAJA* in that the Special Pardons Process is not rationally related to its purpose, which was to recommend appropriate cases for pardon based on *inter alia* disclosure, establishing the true facts, and the showing of a political motivation.

b) Section 6(2)(h) of *PAJA* in that the Special Pardons Process is unreasonable, alternatively, irrational. This was said to be so because there was no prospect of determining the accuracy of disclosures and whether there was in fact a political objective when only one side of the story was told – and what is more, told to a body which was inherently and structurally biased.

c) Section 3(2)(b)(ii) of *PAJA* and the *audi alteram partem* rule in that the Special Pardons Process permitted far-reaching recommendations to be made without any representations from victims.

d) Section 3(3)(b) of *PAJA* and the *audi alteram partem* rule in that the Special Pardons Process prevented victims from disputing information and arguments made by perpetrators and political parties.

e) Section 6(2)(a)(iii) of *PAJA* in that the Special Pardons Process was tainted by actual bias or a reasonable suspicion of bias; while the composition of the Reference Group gave rise to actual or structural bias or a reasonable suspicion of such bias in violation of section 33 of the *Constitution*.

f) Section 6(2)(d) of *PAJA* in that the refusal to include victim participation and to shroud the process in secrecy was materially influenced by errors of law.

Since the purpose of the Special Pardons Process was to make recommendations for pardons based on determinations of whether or not accurate disclosure was made and whether or not the crime in question was committed with a

593 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 128.

political objective, the decision to confine representations to perpetrators and political parties meant that the decision-maker had little or no way of verifying, assessing or testing the claims. This was found to be in violation of the following:[594]

a) Section 6(2)(e)(vi) of *PAJA* in that it amounted to arbitrary or capricious conduct.

b) Section 6(2)(f)(ii) of *PAJA* in that it was not rationally connected to the purpose of the Special Pardons Process.

c) Section 6(2)(h) of *PAJA* in that it amounted to the performance of a function in pursuance of the Special Pardons Process that was so unreasonable that no reasonable person could have so exercised the power or performed the function.

d) Section 6(2)(i) of *PAJA* in that the conduct was otherwise unconstitutional or unlawful.

The President did not accept the correctness of the contention that a decision to grant or refuse a pardon constitutes administrative action. On his turn, the first intervener submitted that the powers conferred on the President by section 84 of the *Constitution* constitute executive powers.[595] A "crucial difference" between executive and administrative action for the present purposes of victim participation was made by the first intervener with reference to *Langa and Others v Hlope* (SCA case no 697/08). He held that the actor who contemplates taking administrative action must, save in exceptional circumstances, afford all interested parties a hearing before taking a decision. The executive actor on the other hand was held not to be subject to such constraint and may, save where the statutory source of his power requires him to do so, make his decision without consulting anybody at all.[596] The coalition agreed that the decision to grant a pardon is the exercise of an executive power, but submitted that it does not answer the question whether or not the exercise of this particular executive power constitutes administrative action. With reference to *President of the Republic of South Africa v South African Rugby Football Union* 2000

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594 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 129.

595 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 40.

596 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) First Intervener's Heads of Argument par. 45.

1 SA 1 CC[597] some conduct of the executive, in the exercise of its powers, will constitute administrative action whereas other conduct will not. It was argued that while it is one of the matters which fall relatively close to what the court referred to in the above-mentioned case as "difficult boundaries", the granting of pardons falls on the "administrative action" side of that boundary, because of the nature and effect of the decision and despite the Presidents wide discretion.[598] The exercise of the power was also said to have very material consequences for the rights and obligations of the parties affected by his decisions.[599]

The President made it clear that he should not be understood as suggesting that a decision to grant or refuse a pardon, although not administrative action, is not open to review by the court. He submitted that the courts have made it clear that the exercise of Presidential powers in terms of section 84(2)(j) of the *Constitution*, even if it constitutes executive action, is subject to control by a court, including by way of review.[600] The President also held that it is always open to the coalition or any other party with a legally cognisable interest, to review a decision to grant or refuse a pardon.[601] The first intervener supported this contention and proposed it to be a more "appropriate", just and equitable remedy.

Once again the coalition was not convinced. They started off by stating that a court's review power in relation to the President's responsibility in terms of section 84(2)(j) of the *Constitution* is not confined to where a President has already acted and done so arbitrarily, inconsistently, or irrationally.[602] Focus here was on prevention rather than cure.[603] They supported this approach by highlighting the

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597 *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 CC par. 142. See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument par. 142.

598 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument 144.

599 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument 145.

600 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit par. 38.3.

601 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit par. 38.1.

602 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 20.6.

603 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 95.3.

consequences of a reversal of a pardon based on *ex post facto* review.[604] Firstly, the outcry which would be generated if people, who had been released from prison following a decision of the President, were then re-arrested if a court decided that the President had not followed the correct procedure. This could (if the matter went on appeal) be some years after they had been released. Secondly, the fact that the people concerned were, on their own account, politically motivated, gives further reason to be concerned about the political disturbance which might be generated if this were to happen. Thirdly, it is also not difficult to predict that those affected would contend, when the matter came to final determination, that even if the President had acted wrongly, they should not be re-imprisoned. Finally, victims will suffer considerable stress and trauma where pardons in relation to particularly serious crimes were to be issued.

The coalition further held that even if it was able to remedy the situation *ex post facto* through a review process, it would not constitute a basis for an unlawful process with its attendant adverse consequences for victims.[605]

The President with the first intervener concurring urged the court to allow him to discharge his constitutional duty to consider and decide on these applications having regard to the provisions of section 237 of the *Constitution*, which requires that such constitutional responsibilities should be performed diligently and without delay. The President went as far as to say that because the *Constitution* authorises Presidential pardons, the considerations of and decisions on pardon application cannot be unlawful.[606]

The coalition concluded this issue by holding that the President's first duty is to act lawfully and that his duty to carry out his functions without delay does not compel or entitle him to act unlawfully. The coalition contended that if the pardon applications were to be granted under the circumstances, it would be unlawful.[607]

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604 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) paras. 97 to 103 and 108.2.

605 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 101.

606 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) The President's Affidavit par. 39.1; First Intervener's Heads of Argument par. 39.

607 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 12.3.

The coalition again made it clear that they do not challenge the constitutional authority to grant pardons, but rather the manner in which it is done in the present context.[608]

2.3.1.2 The common law duty to act fairly

In the alternative to their administrative law challenge, the coalition submitted that the President was in any event under a duty to include victims in the Special Pardons Process and that his failure to do so was inconsistent with the common law duty to act fairly.

With reference to case law, it was held that the duty to act fairly will, in an appropriate case, arise even where the proceedings in question do not constitute administrative action.[609] It was also stated that the correlative common law right to a fair procedure is not abolished by the constitutional right to just administrative action in terms of section 33 of the *Constitution* and *PAJA*. Section 39(3) of the *Constitution* is explicit:

> The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The contention that fairness is one of the core values of the South African constitutional order was used to set the scene for this leg of the applicant's argument.[610] From the outset it was once again made clear that fairness and accountability is context specific because what is reasonable and procedurally fair in one context may not necessarily be reasonable or procedurally fair in a different

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608 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Replying Affidavit to Affidavit of First Respondent (The President of the Republic of South Africa) par. 93.

609 *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A); *Chairman, Board on Tariffs & Trade v Brenco Inc* 2001 (4) SA 511 (SCA); *Van der Merwe v Slabbert NO* 1998 (3) SA 613 (N) ; *Absa Bank Limited v Hoberman NNO* 1998 (2) SA 781 (C) ; *Re Pergamon Press Ltd* 1970 3 All ER 535 (CA) and *R v Lord Savell* 1999 4 All ER 860 (CA). See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument paras.199-205.

610 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* Constitutional Court (Case no CCT 97/07). See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 87.

context.[611] For this reason the coalition gave an overview of what they regarded the context of this particular case to be, which include the "self-imposed benchmark" created by the President and the commitment of the state, in many contexts, to victim participation.[612]

The coalition relied on the public pledge the President made on 21 November 2007 at a joint sitting of Parliament as well as the commitment of the Reference Group at its first full meeting on 6 February 2008 as described above.[613] It was submitted that as a result of the objections[614] to the Special Pardons Process, the process ultimately followed was fundamentally at odds with both these undertakings.[615]

The coalition relied on the court's finding in *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 6 SA 273 (W) that public administrators must be accountable; act lawfully and fairly and not arbitrarily; act honestly and ethically and be bound by their lawful undertakings.[616]

The development of English law with regard to undertakings and commitments made by government was explained by means of the leading work by Wade and Forsyth who analyse the decisions of the courts, and conclude that:[617]

> ...courts now expect government departments to honour their statements of policy or intention, and that there is a clear link between unreasonableness and unfairness...unfairness in the purported exercise of power can amount to an abuse or excess of power.

The coalition warned that if the authorities were to make a commitment of this kind, and then simply abandon them, it would not only run counter to the principles of

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611 *Minister of Health NO v New Clicks SA (Pty) Ltd (TAC as Amici Curiae)* 2006 2 SA 311 (CC). See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 88.

612 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 89.

613 See par. 1 Ch. 1 of this book.

614 See par. 2.2 of this Ch.

615 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument paras. 90, 90.3 and 91.

616 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 92.

617 Wade HWR and Forsyth CF *Administrative Law* 10th ed (Oxford University Press 2009) 372-376. See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 93.

fairness and accountability but also to the high standard of professional ethics and accountable public administration required by section 195 of the *Constitution*.[618] This would entitle a pardon applicant to have that decision set aside on review.[619]

Wade and Forsyth state further:

> If the decision-maker has promised to follow a particular procedure it will be held to that save in very exceptional circumstances.

The authorities may thus, having made an undertaking of this kind, change their minds, but only for good reason, such as overriding public interest. What was said to be striking in this case was that the President did not say that he changed his mind based on exceptional circumstances, he rather denied making a commitment of the sort the coalition rely on and this despite proof to the contrary.[620]

The coalition also urged the Government to comply with its own commitments to a fair process and victim participation. The Government has formally adopted a *Service Charter for Victims of Crime in South Africa* (the *Victims' Charter*) in accordance with section 234 of the *Constitution* in order to:[621]

a) Eliminate secondary victimisation in the criminal justice process.
b) Ensure that victims remain central to the criminal justice process.
c) Clarify the service standards that can be expected by and are to be accorded to victims whenever they come into contact with the criminal justice system.

Furthermore, the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the *UN Declaration*) was held to be of significance in that it provides, *inter alia*:[622]

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618 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 93 and *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument 180.

619 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument 171.

620 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) First to Seventh Respondent's Heads of Argument 181.

621 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 95.

622 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 97.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

   (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
   (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
   (c) Providing proper assistance to victims throughout the legal process;
   (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.

Yet again the coalition relied on the principles and values of the TRC where victim participation, in line with the *Victim's Charter* and the *UN Charter* was accepted as an indispensable requirement.[623]

In conclusion of the duty to act fairly, the reference made to De Ville's conclusion on the matter was enlightening:[624]

> It is now accepted that the advice, findings or recommendations of an investigatory body can adversely affect the rights or legitimate expectations of a person. The audi rule is therefore applicable to the proceedings of such an enquiry where a person or body can suffer prejudicial consequences because of the report or recommendation of the statutory body concerned.

623 *AZAPO v President of the RSA* 1996 4 SA 671 (CC). See *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 99.

624 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 108.

The coalition was of the opinion that under the common law, and at least in the present context, the President is obliged to follow the rules of procedural fairness in conducting his enquiry and making his decision.[625] The fact that the decision involves the exercise by the President of a discretion granted to him by the *Constitution*, does not affect this principle.[626] In *Sachs v Dönges NO* 1950 2 SA 265 (AD) the court stressed that the exercise of this discretion is not without limits.[627] According to Baxter, the traditional view of prerogative powers of a monarch not being subject to judicial scrutiny now shows signs of change and might gradually lose all significance.[628] This approach is widely supported in English law and various other commonwealth jurisdictions even in jurisdictions without a written Constitution containing a Bill of Rights.[629]

2.3.2 Rule of law

It was also submitted that the Special Pardons Process is in violation of the rule of law by facilitating the cessation of all further criminal penalties and the expunging of criminal records of perpetrators through a process which was entirely secret and which prevented victims from being heard. This process was said to eschew the carefully negotiated values, principles and safeguards established during South Africa's transition for addressing crimes committed with a political objective.

The operation of the Special Pardons Process was held to constitute arbitrary conduct since:

a) it was not rationally related to the purpose of the special dispensation, which was to recommend appropriate cases for pardon based on criteria that included disclosure and the showing of a political motivation;

b) there was never any prospect of compliance with such criteria being properly assessed through a process which only sought to hear the

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625 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 109.
626 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 110.
627 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 110.2.
628 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 110.3.
629 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Heads of Argument par. 110.1, 110.4-110.6.

versions of the perpetrators without securing representations of those with a direct interest;

c) the ToR allowed political parties themselves to submit applications on behalf of pardon applicants;

d) the process before the Reference Group has not been open and transparent;

e) the Reference Group did not publicise the applications made by perpetrators;

f) the Reference Group consisted of representatives of political parties and those applying for pardons were offenders who are either members or supporters of the same political parties. The Reference Group was accordingly hopelessly tainted by structural or institutional bias; and

g) there were no independent or neutral experts on the Reference Group who could have provided the President with considered and measured advice.

It was therefore submitted that the Special Pardons Process has given rise to one or more of the following perceptions on the part of the public:

a) Victims of a certain class of crimes, namely political crimes, are denied the full force of justice.

b) There are certain crimes, which include murder, forced disappearances, torture, assault, arson and public violence which, if committed for political purposes, will not be treated as seriously.

c) The commission of crimes is a legitimate political tool.

d) Those involved in politically motivated crimes in the future need not be as concerned about the consequences of their criminal actions.

In conclusion it was held that an infringement of the principle of the rule of law cannot be saved by the application of the limitations clause,[630] as it is not a right in

630 Section 36 of the *Constitution* as described in par. 4.5.2.4 Ch. 3 above and par. 2.3.3.5 of this Ch. below.

the Bill of Rights but instead, arises as a result of the underlying constitutional principle of legality.

2.3.3 Bill of Rights

The Special Pardons Process was said to be substantially unconstitutional and invalid and was challenged on the grounds set out below.[631]

2.3.3.1 Section 9

The Special Pardons Process was held to be in violation of the right to equality[632] by recognising and promoting the rights of perpetrators at the expense of the rights and freedoms of victims and by treating the victims in question less favourably than the victims in the TRC process and in parole proceedings.

In the first instance, it was submitted that these differentiations are irrational because they are not rationally related to any legitimate government purpose. For that reason, it was held to be a violation of section 9(1) of the *Constitution*, namely the first leg of the equality test as described by the Constitutional Court in *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC)[633] and *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC).[634]

In addition, the coalition submitted that section 9(3) of the *Constitution* was infringed given that the victims in question are (precisely as a result of being victims of human rights violations) members of a historically vulnerable group. As a result thereof, the differentiation was said to constitute discrimination and that it must be presumed, in the absence of evidence to the contrary, to be unfair. Again, the coming into operation of the presumption in favour of unfair discrimination is problematic.[635]

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631 See Ch. 3 of this book above for the contents of the relevant sections of the *Constitution* where not provided in this par.

632 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.4 and Coalition's Heads of Argument paras. 121-127.

633 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras. 25 and 26.

634 *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) par. 49.

635 See par. 4.5.2.1 Ch. 3 of this book above.

With regard to the relevance of the victims' right to equality in relation to the issue of prosecution of the perpetrators of human rights violations the coalition referred to article 12 of a 2005 UN report.[636]

2.3.3.2 Section 10

The coalition held that the Special Pardons Process (in the absence of victim participation and consultation) was an affront not only to the right to human dignity[637] of each individual victim, but also to that of members of their families, the communities in which they live and the South African society as a whole.

In affording perpetrators of the most serious crimes an opportunity to escape the full consequences of their crimes, it causes suffering to victims by denying them full justice. In so doing it dishonours their respect, dignity, value and acceptance.

It was further held that since the communities in which the victims live, stand by them in solidarity and compassion, the intrinsic worth of those communities is similarly disrespected. It was also held that since South Africa as a nation made a compact with victims in order to cross the divide from the past to the future, all South Africans are implicated in the breaking of this constitutional compact. The humanity of the South African society as a whole was accordingly said to be demeaned. In this regard reference was also made to the concept of *ubuntu*.[638]

636 See par. 4.5.2.1 Ch. 3 of this book above.
637 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.1.
638 See par. 4.5.2.2 Ch. 3 of this book above.

2.3.3.3 Sections 11 and 12(1)

It was also held that the Special Pardons Process was in violation of the right to life[639] and the right to freedom and security of the person[640] by facilitating the cessation of all further criminal penalties and the expunging of criminal records of those perpetrators who infringed this right by committing acts of murder and enforced disappearances, torture, assault and other cruel and inhuman treatment; thus failing to give value to the lives, freedom and security of victims.

2.3.3.4 Sections 16 and 32

Section 16 - Freedom of expression

(1) Everyone has the right to freedom of expression, which includes-
   (a) freedom of the press and other media;
   (b) freedom to receive or impart information or ideas;
   (c) freedom of artistic creativity; and
   (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-
   (a) propaganda for war;
   (b) incitement of imminent violence; or
   (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Section 32 - Access to information

(1) Everyone has the right of access to-
   (a) any information held by the state; and
   (b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The coalition further held that the Special Pardons Process was in violation of the right to freedom of expression[641] and the right to access to information[642] by denying the coalition, victims, interested members of the public and the media the

639 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.2.
640 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.3.
641 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.5 and Coalition's Heads of Argument paras. 132-134.
642 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.5 and Coalition's Heads of Argument paras. 132-134.

freedom to receive pertinent information in relation to the special dispensation on pardons; denying the press and other media the freedom to report on the special dispensation on pardons and to impart important information to the broader public.

The values of openness, responsiveness and accountability that are articulated in section 1(d) of the *Constitution*, and filtered through the *Constitution*, was further said to create a general presumption that the proceedings of public bodies dealing with matters of great public importance should be open, transparent and accountable to the public.

Applying the above mentioned principles would, according to the coalition, have enhanced the public's respect for the special dispensation and its ultimate recommendations by:

a) permitting the general public to act as a check on the accuracy of the substantive matters before the Reference Group and as a check on procedural fairness; and

b) enabling the public to be informed of matters of fundamental public interest and importance, not least of which are the atrocities committed during the *apartheid* and post-*apartheid* eras.

2.3.3.5 Section 36

The limitations clause was held to be inapplicable[643] based on the fact that the special dispensation is not a law of general application and therefore does not meet the first qualification this section sets.

Consequently the coalition submitted that since the provisions of the Special Pardons Process infringe the rights referred to and discussed above, it is unconstitutional and moreover that it cannot be saved by the limitations clause.[644]

It was further stated that the President has a duty to respect, promote and fulfil the above mentioned constitutionally enshrined rights by virtue of section 7(2) of the *Constitution*.[645]

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643 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.6. See par. 4.5.2.4 Ch. 3 of this book above

644 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit par. 132.7.

2.3.4 International law

The Special Pardons Process was also submitted to be substantively unconstitutional and invalid in that it constitutes an infringement of the international law obligations of South Africa,[646] as set out in sections 231 to 233 read together with section 39(b) of the *Constitution*, to uphold the right to justice and to punish violations of human rights.

The Special Pardons Process was said to violate the following international law instruments to which South Africa is a party, and by which it is bound:

a) Article 2(3), of the *International Covenant for Civil and Political Rights* (*ICCPR*) by denying victims an effective and full criminal justice remedy.

b) Article 6(1), of the *ICCPR* by permitting those who have violated the right to life to escape their full punishment and/or to have their criminal records expunged.

c) Article 7 of the *ICCPR* by permitting the perpetrators of torture or cruel, inhuman or degrading treatment or punishment to escape their full punishment and/or to have their criminal records expunged.

d) Article 4 of the *Torture Convention* by failing to give effect to the requirement that all acts of torture must be punishable by appropriate penalties.

2.4 The court's decision and the effect thereof

On 29 April 2009, the court ruled in favour of the coalition and made the following *interim* order:

(a) The First Respondent is interdicted from granting any pardon in terms of the "Special dispensation for Presidential pardons for political offences" until such time as the proceedings described in Part B is finalised.

(b) The First and/or the Second Respondent are to provide the Applicants with the list of prisoners recommended for release by the Pardon Reference Group.

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645 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit paras. 132.8 and 132.9.

646 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) Coalition's Founding Affidavit paras. 132.10 to 132.14.

(c) Applicants must serve the papers in this matter on the applicants for pardon mentioned in (b) above.

(d) The Second Respondent must make other applicants for parole [except those mentioned in (b) above], aware of these proceedings.

(e) Costs of this application to be costs in the proceedings mentioned in Part B of the notice of motion.

Apart from the ordinary requirements for an *interim* interdict, the court only dealt with the following three issues of content in its judgment and briefly echoed the applicant's arguments in its judgment:

a) The powers of the President.

b) Victims' right to be heard prior to the President exercising his powers in terms of section 84(2)(j) of the *Constitution*.

c) The President's address to the joint sitting of Parliament.

With regard to the powers of the President and whether or not it constitutes administrative action, the court agreed with the coalition. The court based its decision on a common law rule of construction called *unius inclusio est alterius exclusio*, which loosely translated means the express mention of the one is the exclusion of the other. By reason thereof the court found that it was not the legislator's intention to exclude the pardoning power of the President from the definition of administrative action.[647] The court also expressed the view that the application of the rule will not offend any of the values and principles enshrined in the *Constitution*, and that it is therefore appropriate to utilise the said rule.[648]

What victim participation and consultation is concerned, the court also referred to the *Victims' Charter* in relation to the input of victims when a prisoner is to be considered to be released on parole. This was said by the court to accord with the *UN Declaration*. The court also relied on *Derby-Lewis v Minister of Correctional Services* (NGHC case no. 54507/08) where the above was confirmed. The court found that the practical effect of parole and pardon are the same. The court could not find any justification for allowing victims to be heard prior to a parole decision, but to deny the same right to a victim in the case of a pardon.

647 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) par. 7.3.
648 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) par. 7.3.

The court shared the applicant's sentiments with regard to the so-called "self imposed benchmark" and found that President Mbeki made a lawful commitment to the public which accords with the basic values and principles of the TRC and enshrined in the *Constitution*. The court then found that victims should be heard in order for the President to act in accordance with his commitment.

The President and the Minister of Justice applied for leave to appeal before the High court and in the alternative to the SCA. The first intervener on the other hand applied for leave to appeal directly to the Constitutional Court which decision was later supported by the President and the Minister of Justice, but objected to by the coalition. The basis of the parties' grounds for appeal will not be dealt with separately for it mirrors, to a large extent that which has been discussed above. A summary of this case as well as the Constitutional Court's decision will be provided below.[649]

3 The *Chonco*-case

In *Chonco v Minister of Justice and Constitutional Development* (TPD case no 21224/2007), the applicants successfully sought an order in the Gauteng North High Court declaring that the Minister of Justice, as the assignee or delegated member of the National Executive, had failed to exercise her constitutional obligation to process, without delay, the applications for pardons, to enable the President to consider and decide upon the applications. One of the defences raised by the Minister of Justice was that there was no policy in place to deal with pardon applications for crimes committed with a political objective. The Minister of Justice filed an affidavit in which she stated that the Department was:

> ...desirous of obtaining a defensible departmental framework for the evaluation of [*apartheid* era] applications.

The court ordered the Minister of Justice to take all necessary steps to enable the President to carry out his obligations in terms of section 84(2)(j) of the *Constitution*.

649 See par. 4 of this Ch.

The Minister of Justice appealed, without success, to the SCA. The SCA held that the steps taken by the Minister of Justice constituted a "preliminary executive function", under section 85(2)(e) of the *Constitution*, since it was an act required to lay the foundation for the ultimate decision of the President.

The Minister of Justice again appealed, this time to the Constitutional Court, arguing that the effect of the judgment of the SCA is to fuse the obligations of the President as Head of State with the obligations of the President as head of the National Executive. The court was accordingly called upon to determine whether or not the pardon process operates only under the pardoning power granted by section 84(2)(j) of the *Constitution*, leaving all constitutional obligations with the President; or whether the Minister of Justice's act of processing the applications for pardon is an exercise of public power in terms of section 85(2)(e) of the *Constitution*, so creating new and distinctive constitutional obligations for the Minister of Justice.

In a unanimous judgment, the court held that section 84(1) of the *Constitution* confers upon the President a set of auxiliary powers, in addition to the principal decision-making power, to assist him in fulfilling the powers, functions and obligations placed on the President by section 84(2) of the *Constitution*. The power to request assistance in the preliminary processing of pardon applications was such a power, vested in the President in his capacity as Head of State.

The court further held that the exercise of powers and functions under section 84 of the *Constitution* is distinct from those under section 85 of the *Constitution*. The former are performed exclusively by the President and members of the Cabinet. Were the preliminary process to be considered a collective action, the result would be that a failure by the Minster to take preliminary action would prevent the President from exercising a function and power accorded solely to him, so frustrating his powers as Head of State. The President must accordingly retain the sole ability to remove his instructions, bypass the process initiated by him, or transfer the preliminary consideration elsewhere.

Consequently, the Court upheld the Minister of Justice's appeal. Mr. Chonco ought to have sued the President, not the Minister of Justice, to obtain the relief he sought. However, the Court awarded costs against the Minister of Justice on the grounds that unacceptable delays had occurred in processing the pardon

applications. The only available option to Mr. Chonco had been to pursue litigation and the Minister of Justice appeared to be the correct party to sue, in light of public statements by the President that he would only consider the appropriateness of a Presidential pardon once the preliminary process had been completed by the Minister of Justice.

In a subsequent development, Mr. Chonco has applied for direct access to the Constitutional Court to amend the original notice of motion in the High Court, which sought relief only against the Minister of Justice. In the alternative Mr. Chonco sought relief against the President to the effect that the President failed to exercise, with diligence and without undue delay, his constitutional obligations, and that he is required to make a decision on the matter within three months. The Minister of Justice and the President opposed the application for direct access and submitted that the President had merely sought advice from the Minister of Justice and had not sought to confer an authority on her which was his and his alone. The matter was then heard on 4 February 2010.[650] On the day of the hearing, counsel for the President handed in a supplementary affidavit in which the President stated that he had considered all 384 applications for pardon. The President disclosed that he had decided to reject 230 of these applications. He stated that decisions in respect of the remaining 146 applications (in which the applicants concerned had either elected to apply for pardon under the Special Pardons Process or whose circumstances were closely related) had been deferred until this Court's judgment in *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4, CCT 54/09, then pending, but subsequently handed down on 23 February 2010, had been delivered.[651] Consequent to the President's supplementary affidavit, the applicants informed the Court that they would no longer persist in seeking the relief sought as same had been substantially obtained.

The President in *CSVR v The President of the Republic of South Africa* attempted to persuade the court with the sentiments expressed in the decision of the SCA in *Minister of Constitutional Development v Chonco* 159/08 2009 ZASCA 31 of 30 March 2009 by submitting that the order the applicants sought, namely to interdict

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650 *Mqabukeni Chonco v President of the Republic of South Africa* CCT 94/09 [2010] ZACC 7, judgment delivered on 16 March 2010. For this purpose the Constitutional Court's media summary was used.

651 See par. 4 of this Ch. below for the summary of this case.

the President, would delay the President in discharging his constitutional responsibility.[652]

With regard to the impact of the above decision of the SCA, the court in *CSVR v The President of the Republic of South Africa*, was of the view that it had no effect on the question as to how the President should go about in exercising his power to decide on whether or not to grant a pardon. The court further held that if victim participation is allowed, that does not mean that the President is deprived of his constitutional responsibility.[653]

4 The *Albutt*-case

In *Ryan Albutt v Centre for the Study of Violence*,[654] Mr. Albutt, the President and the Minister of Justice applied to the Constitutional Court for leave to appeal against the *interim* order granted by the Gauteng North High Court in *CSVR v The President of the Republic of South Africa* and in addition, brought an application for direct access challenging the constitutionality of section 1 of *PAJA*, should the Court conclude that *PAJA* defines the exercise of the power to grant pardon as administrative action.

Mr. Albutt, the President and the Minister of Justice argued that the victims of the offences in respect of which pardon was sought are not entitled to make representations before a decision to grant pardon is made. They submitted that the decision whether to grant pardon constitutes executive action and is therefore not subject to the procedural requirements in *PAJA*. In the alternative, they argued that if *PAJA* defines administrative action to include the exercise of the power to grant pardon, it is unconstitutional.

The NGOs contended that the High Court was correct to find that the exercise of the pardon power constitutes administrative action, and that this power is therefore subject to the procedural safeguards in *PAJA*. In addition, they maintained that the very nature of the Special Pardons Process requires the President to give the victims an opportunity to make representations. They submitted that, like the amnesty process of the TRC, the objectives of the Special Pardons Process are to

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652 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) par. 8.
653 *CSVR v The President of the Republic of South Africa* (TPD case 15320/09) par. 8.
654 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC). For this purpose, the Constitutional Court's media summary will suffice.

promote national unity and national reconciliation, which cannot be achieved without the participation of victims. Accordingly, they contended that the failure to give victims an opportunity to make representations was not rationally related to the achievement of the objectives of the Special Pardons Process.

In a unanimous judgment, Ngcobo CJ found that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by it. Ngcobo CJ observed that when former President Mbeki announced the Special Pardons Process, he outlined its objectives, which were national unity and national reconciliation, and stated that he would be guided by the criteria, principles and spirit that underpinned the TRC amnesty process. Ngcobo CJ held that, given our history, victim participation in accordance with the principles of the TRC was the only rational means to contribute towards national unity and national reconciliation. Ngcobo CJ found further that, based on the context specific features of the Special Pardons Process, victims must be given the opportunity to be heard in order to determine the facts on which pardons are based, namely, whether the offence was committed with a political motive.

Accordingly, Ngcobo CJ held that victims are entitled to an opportunity to be heard before the President makes a decision to grant a pardon under the Special Pardons Process. In making this finding, Ngcobo CJ emphasised that it applies only to applications for pardon that have been brought under the Special Pardons Process, and not to other categories of applications for pardon.

Ngcobo CJ found it unnecessary to consider whether *PAJA* defines administrative action to include the exercise of the pardon power, and therefore declined to consider the direct access application.

A separate concurring judgment was written by Froneman J with Cameron J and Van der Westhuizen J concurring, which agreed with the findings of Ngcobo CJ in all respects but provided additional comments in support of the judgment. These comments situate the Court's findings on the rule of law within the context of South Africa's recent and precolonial history. The judgment emphasises the African legacy of participation of citizens in societal affairs and notes how this tradition further legitimises the interpretation of the rule of law in this matter. The comments

were made with the caveat that they do not speak to pardon issues beyond the confines of the facts of this case.

5 Presidential pardons in Argentina

Firstly, a brief background[655] to Argentina's history will be given with specific reference to the implementation of measures including Presidential pardons to address crimes committed between 1976 and 1983. Secondly, the scrutiny of these measures will be analysed and evaluated with the aim of possible application in the South African context.

5.1 Background

In 1976, armed forces seized power in Argentina to bring an end to President Peron's chaotic period. The military government[656] started the so-called National Reorganisation Process[657] and ruled Argentina from that moment on. This period was also characterised as the "dirty war" which was met with international condemnation.

In 1982, Great Britain defeated the armed forces in Argentina in the so-called Falkland's war and forced the military government to return to civilian rule. In the democratic elections of 1983, Alfonsin was elected as President and steps were taken under his government to investigate, prosecute and try the former military leaders for the crimes they had committed. The National Commission on Disappeared Persons was established and the "Never Again" Report documented the systematic violation of human rights by the military regime for these purposes.

The new government undertook prosecutions of the first three *juntas* of dictatorship which involved 700 separate crimes and five out of nine men were convicted. The courts also turned to numerous other military personnel which caused tension between the Government and the armed forces. The Government then decided to place limits on trials and in 1986 the "Full Stop Law"[658] was established which provided for a two month deadline for the filing of all criminal

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655 Kritz N *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* vol. II (U.S. Institute of Peace Press Washington DC 1995) 323-324.
656 Also referred to as *La Junta Militar* or *La Dictadura*.
657 *Proceso de Reorganización Nacional*, often simply *El Proceso*.
658 *Ley de Punto Final*, Law No. 23.492.

complaints against military officers by victims. This sparked major rebellion by junior army officers in 1987 on which President Alfonsin reacted by adopting the "Due Obedience Law"[659] in June 1987. This law introduced a presumption of due obedience, shielding lower-ranking officers of the army and the security forces for acts committed under orders from their superiors during the military government.

President Alfonsin's successor, President Menem, declared that permanent reconciliation among all Argentineans was the only possible solution for the wounds that still remain to be healed. This was in the form of Presidential pardons and in 1989, he issued a decree[660] in terms of article 86, paragraph 6 of their *Constitution* as a result of which pardons were granted to 39 military officials along with 200 other personnel. He further pardoned the convicted leaders of the military government in 1990 by means of another decree.[661]

In the preamble to the decree on Presidential pardons, it was stated that the measure is only a political mechanism, provided for by their *Constitution*. Furthermore, that it is the responsibility of the National Executive Authority to place the supreme interest of the nation before any other and thereby to meet the historical challenge that this highly political decision entails. The motivation behind utilising this mechanism was that:

> ...in spite of the time that has passed since the complete restoration of constitutional institutions, the measures that have been taken so far have not been sufficient to overcome the deep divisions that still remain in the heart of our society.

5.2 Scrutiny of Presidential pardons: Argentina and South Africa

5.2.1 Argentina

"Presidential pardons" as a measure taken by Argentina to address their past have been scrutinised by various international human rights bodies.[662] In its concluding observations to Argentina in 1995, the Human Rights Committee (HRC) found that by denying the right to an effective remedy for those who were the victims of human rights violations during the period of authoritarian government, violated

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659 *Ley de Obediencia Debida*, Law No. 23.521.
660 Decree 1002/89.
661 Decree 2741/90.
662 Other measures include the so called "Full Stop Law" and "Due Obedience Law".

paragraphs 2 and 3 of article 2 and paragraph 5 of article 9 of the *ICPR*, and that therefore:[663]

> ...the compromises made by the State party with respect to its authoritarian past, are inconsistent with the requirements of the Covenant.

The HRC expressed concern that, *inter alia*:[664]

> ...amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children [and] that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations.

In its concluding observations dated November 2000, the HRC reminded the Government of Argentina that:[665]

> Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice.

The UN Committee against Torture took the view that the measures taken by a "democratically elected" government for acts committed under a *de facto* government is incompatible with the spirit and purpose of the *Torture*.[666]

The Inter-American Commission on Human Rights (IACHR) concluded that the measures are incompatible with the obligations of the Argentine State under the *American Declaration of the Rights and Duties of Man* (*American Declaration*) and

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663 *Concluding Observations of the Human Rights Committee: Argentina*, 5 April 1995, UN document CCPR/C/79/Add.46;A/50/40 par. 146. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 24.

664 *Concluding Observations of the Human Rights Committee: Argentina*, 5 April 1995, UN document CCPR/C/79/Add.46;A/50/40 par. 146. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25.

665 *Concluding Observations of the Human Rights Committee: Argentina*, 3 November 2000, UN document CCPR/CO/70/ARG par. 9. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25.

666 Committee against Torture, Communications Nos. 1/1988, 2/1988 and 3/1988, Argentina, Decision of 23 November 1989, par 9. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25.

the *American Convention on Human Rights* (*American Convention*).[667] The IACHR, recalling that "in systems that allow it – such as Argentina's – the victim of a crime has a fundamental civil right to go to the courts",[668] took the view that, since the measures prevented the exercise of the right to be heard by an independent and impartial tribunal, the Argentine State had, by sanctioning and applying such measures, "failed to comply with its duty to guarantee the rights" protected under article 8.1 of the *American Convention*. The IACHR also pointed out that the measures constituted a violation of the obligation to guarantee the right to judicial protection recognised in article 25 of the *American Convention*.[669] Furthermore, bearing in mind the obligation of the Argentine State to respect and guarantee the rights protected by the *American Convention*, the IACHR was of the opinion that "by its enactment of these measures, Argentina has failed to comply with its duty under article 1.1."[670]

On the basis of these considerations and since the sanctioning of the measures Argentina took had the legal effect of depriving victims of their "right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly", the IACHR concluded that:[671]

> Laws No. 23,492 and No. 23,521 and Decree No. 1002/89 are incompatible with Article XVIII (right to a fair trial) of the *American Declaration of the Rights and Duties of Man* and articles 1, 8 and 15 of the *American Convention on Human Rights*.

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667 Inter-American Commission on Human Rights, Report No. 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 Oct. 1992. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25.

668 Inter-American Commission on Human Rights, Report No. 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 Oct. 1992 par. 34. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25.

669 Inter-American Commission on Human Rights, Report No. 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 Oct. 1992 par. 39. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25.

670 Inter-American Commission on Human Rights, Report No. 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 Oct. 1992 par. 41. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25.

671 Inter-American Commission on Human Rights, Report No. 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 Oct. 1992 Finding 1. See Amnesty International and International Commission of Jurists *Legal Memorandum: The Full Stop and Due Obedience Laws* 25-26.

The strengthened international recognition of the need to prevent and punish international crimes as reflected in the above mentioned developments, has paved the way for a fundamental change in Argentina's national sphere. These measures were consequently declared to be null and void with retrospective effect.[672]

5.2.2 *South Africa*

The Democratic Alliance (DA) has recently proposed a private members' legislative proposal on Presidential pardons called "The Presidential pardons Bill". The Bill would require the Minister of Justice to make a written recommendation to the President on whether to pardon an applicant and would require the President "to take into account" the recommendation before granting a pardon. In so doing, the Bill would require the Minister of Justice to have regard to a list of guidelines before making a recommendation to the President. These guidelines are currently non-binding guidelines and include:[673]

a) The age of the offender at the time of the commission of the offence;

b) Whether a reasonable period has lapsed since the conviction;

c) Circumstances surrounding the commission of the offence;

d) The nature and seriousness of the offence;

e) Personal circumstances of the offender at time of application;

f) The interest of the State and the community; and

g) The interests of the victim, if any.

With reference to the *Hugo* case, and specifically to an almost identical provision in the *interim Constitution*, De Vos, argues that this draft Bill, if passed, might run into serious constitutional difficulties:[674]

> The powers of the President under section 82(1) are expressed in wide and unqualified terms. Unlike most other presidential powers they can be exercised without the

672 Through a series of decisions by federal and appeal courts, followed by the executive's proposal and ultimate acceptance by law with the adoption of Law 25.779.

673 See par. 4 of the DA's proposed Presidential pardons Bill.

674 De Vos P A short lesson on Presidential pardons 2010 http:// constitutionallyspeaking.co.za/a-short-lesson-on-presidential-pardons/ [date of use 21 April 2010].

> concurrence of the Cabinet.... his discretion is unfettered, in the sense that it is not expressly limited by the interim Constitution.

In this regard, De Vos held that an ordinary law cannot limit the almost "unfettered" powers granted to the President by the *Constitution*.[675] This is said to be an inevitable consequence of the supremacy of the *Constitution*. However, this does according to him not mean that where the President pardons an individual, that decision cannot be reviewed by a Court:

> In cases where the President pardons or reprieves a single prisoner it is difficult, (save in an unlikely situation where a course of conduct gives rise to an inference of unconstitutional conduct), to conceive of a case where a constitutional attack could be mounted against such an exercise of the presidential power... This does not mean that if a president were to abuse this power vested in him or her under section 82(1)(k) a court would be powerless, for it is implicit in the interim Constitution that the President will exercise that power in good faith. If, for instance, a president were to abuse his or her powers by acting in bad faith I can see no reason why a court should not intervene to correct such action and to declare it to be unconstitutional. For example, a decision to grant a pardon in consideration for a bribe, could no doubt be set aside by a court. So, too, if a president were to misconstrue his or her powers I can see no objection to a court correcting such an error, though it could not exercise the discretion itself.

According to the *Hugo* case there are at least two situations in which this executive act of the power to pardon may be important. Firstly, it may be used to correct mistaken convictions or reduce excessive sentences and secondly, it may be used to confer mercy upon, inter alia, individuals when the President thinks it will be in the public benefit for that to happen.

In the current context, the Special Pardons Process arguably cannot be equated with the above-mentionded situations. No plausible argument that the pardon applicants were wrongly convicted has been presented. It would clearly also not be in the public benefit to pardon these applicants as it would send a signal that all are not equal before the law and that if one happens to commit a crime with a political objective one could escape just punishment merely because the political party one is a member or supporter of does not recognise the legitimacy of the TRC.

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675 De Vos P A short lesson on Presidential pardons 2010 http:// constitutionallyspeaking.co.za/a-short-lesson-on-presidential-pardons/ [date of use 21 April 2010].

This would undermine respect for the rule of law and place severe strain on constitutionalism. With regard to the separation of powers, it is held by some[676] that the pardoning power in terms of section 84(2)(j) of the *Constitution* which amounts to an overturn of any judicial sentence, despite the constitutional guarantee in section 165(5) of the *Constitution* which determines that judicial sentences "binds all persons whom and organs of state to which it applies", is worrying. This is said to obviously give rise to an irreconcilable conflict of two constitutional provisions and it is suggested that one of the two provisions will have to go and that if South Africa wants to be a constitutional state it clearly cannot be section 165(5) of the *Constitution*.[677]

In this regard specific reference is made to a 1969 tie-break decision of the German Constitutional Court where half of the judges found the prerogative of pardon not to be compatible with the separation of powers in a modern constitutional state because the residual nature of the power impinges upon the domain of the judiciary.[678] This was said to be so because the result is that the prosecution and adjudication of criminal offences are dealt with in terms of criminal law, and then miraculously the expungement of sentences and criminal records are treated as if it falls under administrative law.

It is further argued that the manner in which pardons are currently invoked, infringes upon a number of fundamental rights including sections 34 and 35 of the *Constitution* which enshrines the right of persons that criminal trials will be heard by competent courts of law and that fair judicial sentences will be meted out.[679] Furthermore it is noted that these powers have been restricted by custom and convention.

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676 L Wolf "Shaik for de Kock: Constitutional repercussions of an outdated royal relic" *Legal Brief* 18 Jan 2010.

677 L Wolf "Shaik for de Kock: Constitutional repercussions of an outdated royal relic" *Legal Brief* 18 Jan 2010.

678 Wolf L Pardons: An outdated royal relict 2010 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=156563&sn=Marketingweb%20detail [date of use 23 April 2010].

679 L Wolf "Shaik for de Kock: Constitutional repercussions of an outdated royal relic" *Legal Brief* 18 Jan 2010.

6 Conclusion

From the scope of the Special Pardons Process, it is clear that Presidential pardons in terms of section 84(2) of the *Constitution* was established by former President Mbeki in November 2007 to deal with pardon applications from persons convicted for offences they claim were politically motivated, but who did not participate in the TRC. Reasons for not participating in the TRC include the fact that the crimes committed by these persons fell outside the scope of the TRC and that in some cases the political party these pardon applicants supported or were members of did not recognise the legitimacy of the TRC.

In essence, the question in the *CSVR* and *Albutt* cases was whether or not the President's pardoning power in terms of section 84(2)(j) of the *Constitution* constituted administrative action requiring him, save in exceptional circumstances, to afford all interested parties a hearing before taking a decision. The Constitutional Court, however, did not find it necessary to consider the above, but rather construed a duty to provide for victim participation from the context specific features of the Special Pardons Process and its objectives as outlined by President Mbeki.

The significance of Presidential pardons in terms of the Special Pardons Process as mechanism to address *apartheid* era crimes in the aftermath of the TRC, as well as the appropriateness and constitutionality thereof did not receive attention.

The significance of the Special Pardons Process is that some of the Presidential pardon applicants have already been prosecuted and convicted for *apartheid* era crimes. Perhaps the highest profile applicants are Adriaan Vlok, the former Minister of Law and Order and Johannes Velde van der Merwe, the former Commissioner of the South African Police who had authorised the elimination of an anti-*apartheid* activist, Rev. Frank Chikane. Should the President decide to grant Presidential pardons to Vlok and Van der Merwe, their criminal penalties will be terminated and their criminal records expunged.

It is submitted that this result will fly in the face of both the TRC and post-TRC prosecutions in that successful applicants under the Special Pardons Process, who should in fact face prosecutions and its consequences submitted to be the only credible alternative to an amnesty process, can now reap the benefits of a failing justice system by making use of the Government's management-by-crisis approach

to the fragile post-TRC phase on South Africa's journey to transformation and reconciliation.

In establishing a TRC, one of the vital decisions would be the scope of its mandate in relation to the crimes and the dates between which these crimes were committed. Surely this is no easy task, but with due regard to the particular country's history and careful consideration of an event or series of events which symbolises or stands out as the start and finish of a political uprising, a decision has to be made and stood by. The purpose of selecting a particular time frame would be to include and deal with as much of the events as possible and as needed to secure a successful transition. Amnesty for political offences of the past was therefore a transitional measure with a definite cut-off date.

For the President to consider further alternatives through another process to address crimes that fell outside the scope of the TRC's mandate with regard to its time frame, flies in the face of the negotiated settlement, the TRC, victims and fellow South Africans who had to learn to accept the terms and conditions of the settlement and invest in the TRC process aimed at national reconciliation.

One of the outcomes of the negotiated settlement was a once-off conditional amnesty through a TRC process. This was regulated at a constitutional level by the *Interim Constitution* and confirmed as such by the Constitutional Court in *AZAPO*. The settlement and the consequent establishment and operation of the TRC involved all affected and interested parties. It does not follow that the President, albeit Head of State, should now have the sole authority to decide on and implement a process to address matters being this sensitive to national reconciliation. The President therefore cannot reactivate amnesty proceedings with a simple executive regulation without any legislative foundation to use as basis for granting pardons for political offences.

To further consider applications "for a second bite at the amnesty cherry" made by those who did not take part in the TRC and condoning political affiliation as an excuse for not taking part in the TRC process is unacceptable. Being a member or supporter of a political party, committing crimes in furtherance of that political party's agenda and not taking part in the TRC process aimed at addressing those crimes were choices they made. The relevant political party and its members/supporters

now simply have to face the consequences of their decisions they made knowing that prosecutions would be imminent. At the time they were arrogant enough to undermine the national project on transformation and reconciliation, now they should serve their sentences in the same spirit.

With reference to Argentina and the unlawful measures its Government took in pursuit of final national reconciliation, it is suggested that South Africa should draw on the Argentinean experience with regard to the appropriateness and constitutionality of Presidential pardons as measure to address "unfinished business" in an attempt to bring closure on the matters relating to convictions of those perpetrators who allegedly committed crimes in pursuit of political objectives. The motivation behind the Special Pardons Process as explained by President Mbeki in his address on 21 November 2008 share to some extent the same sentiments of those mentioned in the preamble to the Argentinean Decree on Presidential Pardons.

It seems that President Mbeki's justification for utilising Presidential pardons in terms of section 84(2)(j) of the *Constitution* sufficed, namely that after all other relevant statutory provisions (only related to amnesty and indemnity) were considered, he did not find any suitable existing measures. It is submitted that prosecutions and its consequences are suitable existing measures, which do provide closure since it is the negotiated and internationally recognised credible alternative to amnesty. Why convicted perpetrators of crimes committed with a political objective are being accommodated, is disconcerting and the only conceivable reason for this is political pressure and interference threatening the independence of the judiciary.

South Africa is a country still in its democratic adolescence and fragile in its development. It is submitted that the ongoing transformation process will be jeopardised with attempts to speed up the process with inappropriate and unconstitutional measures such as Presidential pardons.

CHAPTER 6
CONCLUSION

1 Synopsis of findings and recommendations

It became clear that transitional justice involves a combination of complementary judicial and non-judicial strategies for confronting past abuse as a component of a major political transformation. For purposes thereof, a distinction was drawn between initial, successive and additional measures.

The objective of this study was not to answer the question of whether or not the initial decision to grant amnesty in the context of the South African TRC was compatible with both national and international law. In order to contextualise the study and to illustrate the tension between amnesty and prosecutions, reference was made to various viewpoints on the above-mentioned question. The *AZAPO* case considered in this study did not provide an answer on the compatibility of the TRC with international law, and it has been established that there is no uniformity between scholars on the issue. A distinction was, however, drawn between permissible and impermissible amnesties and Dugard's view is supported, namely, that amnesty through a body such as the South African TRC can qualify as permissible amnesty and therefore be regarded as a valid exception to a duty to prosecute.

It has been established that in the context of this study, all hope is usually placed on initial measures in the form of amnesty, and that very few countries have had the necessary foresight and placed sufficient emphasis on the fact that more than one measure, implemented either simultaneously or individually, is usually necessary for successful, comprehensive and sustained transition and reconciliation. The result thereof is that successive measures in the form of prosecutions in the aftermath of an amnesty scheme are rarely implemented despite the fact that prosecutions are regarded as the only credible alternative to amnesty and despite a duty to prosecute be it international or national, resting on the relevant country.

Political considerations, specifically the lack of political will to prosecute perpetrators of crimes committed with a political objective, was the main reason identified for this unsatisfactory result. Due to the political nature of the crimes in question, the fear was identified that prosecutions could result in the recurrence of rifts between ethnic groups and fuel alienation. These sentiments were the reason

why amnesty was initially opted for in reaching a settlement of South Africa's political crisis in 1994 and cannot arguably be used to tiptoe around post-TRC prosecutions too, especially since it is supposed to compliment the work of the TRC by addressing unresolved matters in the overall project of transformation and reconciliation. It is again emphasised that much of the credibility the TRC has won, both nationally and internationally, will dissipate if the post-TRC phase is left hanging in mid-air. Apart from this effect, it has also been established that the failure to prosecute may signal to future perpetrators that the consequences of not seeking amnesty may be minimal.

The South African Government's prosecution initiative after the TRC completed its work in 1998 and the Amnesty Committee its in 2003 was then investigated. This relates to the amendment of the National Prosecution Policy to specifically make provision for post-TRC prosecutions and thereby balancing the sensitivities of national reconciliation in the prosecuting process. Critique was raised against the fact that the policy amendments were only finalised in 2005 and the point was made that this substantial lapse of time could have been prevented by having prepared and proposed a strategic prosecution plan during the initial negotiations where post-TRC prosecutions were envisaged.

As became clear, the policy amendments caused a public stir, especially the additional criteria introduced by part C. These criteria included the degree of remorse shown by the alleged offender, his or her attitude towards reconciliation; the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of the society. It was established that the court in the *Nkadimeng*-challenge was troubled by the similarity between the above-mentioned criteria and those in section 20 of the *PNURA* the Amnesty Committee had to consider in applications for amnesty. The court found that if these considerations had to remain on the book, it would amount to a "prosecutorial indemnity"' and ultimately result in a "re-run" of the TRC. From this it became clear which considerations should and should not govern a decision to prosecute.

Various substantial and procedural issues relating to post-TRC prosecutions were further identified, analysed and evaluated. It became apparent that most of

these issues are the result of either Government's failure to make sufficient provision in its strategic plan and budget for law enforcement and the judiciary in general and for post-TRC prosecutions in particular, or the fact that many of the *apartheid* era crimes were committed more than three decades ago.

A direct consequence of Government's failure to make sufficient provision is organisational and financial constraints which clearly are stumbling blocks in the way of successful prosecutions. To improve upon the afore-mentioned, it became evident that, amongst others, new prosecutorial, research and support posts should be created, and that the PCLU be allocated larger premises and operational equipment, to continue to professionally handle its usually high profile responsibilities.

What also became clear is that time is of the essence when prosecuting crimes of the past. Apart from prescription, a substantial lapse in time between the commission of the offence, its investigation and eventual prosecution, (three decades in most of the cases in question) adversely affects the availability and reliability of witnesses and evidentiary material. It is proposed that this effect can be limited if prosecutions as successive measure is implemented directly after an amnesty scheme in terms of a strategic prosecution plan finalised well in advance.

It has further been established that section 31(3) of the *PNURA* which determines that testimony given at the TRC hearings is inadmissible in a subsequent criminal trial, cannot be circumvented. In this regard reference was made to a "Briefing Paper" on the relationship between the Sierra Leonean Special Court and Sierra Leonean Truth and Reconciliation Commission in which it was held that information received by the TRC would not be such that it may be admissible as evidence before a court of justice for the proceedings before the TRC were not "judicial" and the information received by the TRC was consequently not tested by cross-examination. It is submitted here that the same argument can be applied in the South African context.

Various ways in which evidentiary constraints can be limited were explored and it was established that it can be successfully implemented. Reference was made to standard arrangements in the normal execution of justice and the prosecuting mandate, which are accommodated in existing legislation, such as plea and sentence agreements, and indemnity agreements in terms of which incriminating evidence by co-accused turned state witness for the prosecution are exchanged for indemnity from prosecution as well as the *Rules of Procedure and Evidence* of the ICTY pertaining to unavailable witnesses.

With regard to the identified "classes" of offenders, a proposed prioritising strategy was identified, analysed and evaluated. A distinction was drawn between low, middle and high priority cases and it was accepted that emphasis should be on "prioritising" high priority cases in striking a balance between the need for justice and the recognition of the practical limitations of the criminal justice system. Also pertaining to the proposed prioritising strategy, two contradictory suggestions, namely that state actors should be pursued over liberation movement actors and the need for even-handedness were contrasted and evaluated. It was noted that in general, the view is that liberation movement actors occupy the moral high ground and that the planners and senior facilitators of *apartheid* should be investigated and prosecuted in advance. This view was, however, qualified in this study by referring to examples where acts of protest by liberation movement actors were out of proportion to the political objective they pursued. In these circumstances it was held that the pedestal liberation movement actors are placed on cannot be justified and that they should accordingly be treated the same as state actors. The afore-mentioned was finally toned down by a more practical consideration regarding the decision whether or not to prosecute, namely the availability of sufficient evidence and the fact that it cannot always be ensured that such evidence will be even-handed.

An appropriate sentencing framework for post-TRC prosecutions was also explored and it was established that ordinary sentences in terms of the existing sentencing framework are not appropriate in the context of transformation and reconciliation. The suggestions made in this regard by the CSVR were supported, especially to the extent that it calls for a victim-centred approach within a restorative justice framework which allows for alternatives to imprisonment. Judicial recognition

of restorative justice and the indigenous legal approach to punishment and the feasibility of introducing it into the criminal justice system were further investigated and it was suggested that it should be extended to post-TRC prosecutions. Given the fact that South Africa is a multicultural country made up of various traditional indigenous communities each with their own customs and beliefs, the view was supported that particular circumstances surrounding each case should be investigated carefully in order to acknowledge and incorporate some of the basic beliefs and values of traditional indigenous communities.

Finally, additional measures to the TRC's amnesty scheme was investigated, namely that of Presidential pardons in terms of section 84(2) of the *Constitution* and effected by the Special Pardons Process. From the scope of the Special Pardons Process, it was clear that this measure was aimed at dealing with pardon applications from persons convicted for offences they claim were politically motivated, but who did not participate in the TRC for various reasons. These reasons were identified and it was established in this study that efforts to accommodate perpetrators in this regard are without merit.

The objections to the Special Pardons Process were identified and the legal challenges on the constitutionality thereof were investigated. It was clear from the cases considered that in essence, the question was whether or not the President's pardoning power in terms of section 84(2)(j) of the *Constitution* constituted administrative action requiring him, save in exceptional circumstances, to afford all interested parties a hearing before taking a decision. The significance of the Special Pardons Process for post-TRC prosecutions and the appropriateness thereof as mechanism to address *apartheid* era crimes in the aftermath of the TRC did, however, not receive attention in the relevant cases considered. It was established that some of the Presidential pardon applicants have already been prosecuted and convicted for *apartheid* era crimes and that the President can now, by way of his pardoning power, overturn a judicial sentence, despite the constitutional guarantee in section 165(5) of the *Constitution* which determines that judicial sentences "binds all persons to whom and organs of state to which it applies".

It was concluded that the above-mentioned result flies in the face of the negotiated settlement reached in 1994, the TRC, victims, perpetrators who came forward and complied with the necessary requirements as well as fellow

South Africans who had to learn to accept the terms and conditions of the settlement and invest in the TRC process aimed at national reconciliation. Unsuccessful amnesty applicants or uncooperative perpetrators ought not to be able to reap the benefits of a failing justice system by making use of the Government's management-by-crisis approach relating to Presidential pardons. Clearly post-TRC issues do not constitute exceptional circumstances under which the President should exercise his pardoning power. In any event, it was noted that this power has been restricted by custom and convention and was also found not to be compatible with the separation of powers in a modern constitutional state because the residual nature of the power impinges upon the domain of the judiciary. It was further held that it infringes upon a number of fundamental rights including sections 34 and 35 of the *Constitution* which enshrines the right of persons that criminal trials will be heard by competent courts of law and that fair judicial sentences will be meted out. To avoid a situation where it will become tempting or necessary to implement additional measures such as Presidential pardons to an amnesty scheme through a TRC, it has been suggested that care should be taken by societies in transition in making decisions regarding the scope of a TRC's mandate in relation to the crimes and the dates between which these crimes were committed.

With reference to Argentina and the unlawful measures its Government took in pursuit of final national reconciliation, it was suggested that South Africa should draw on the Argentinean experience with regard to the appropriateness and constitutionality of "Presidential pardons" as measure to bring closure on matters relating to convictions of those perpetrators who allegedly committed crimes with a political objective.

It seems that President Mbeki's justification for utilising Presidential pardons in terms of section 84(2)(j) of the *Constitution* sufficed, namely that after all other relevant statutory provisions (only related to amnesty and indemnity) were considered, he did not find any suitable existing measures. It has been submitted in this study that prosecutions and its consequences are suitable existing measures, which do provide closure since it is the locally negotiated and internationally recognised credible alternative to amnesty. Why convicted perpetrators of crimes committed with a political objective are being accommodated, is disconcerting and

the only conceivable reason for this is political pressure and interference threatening the independence of the judiciary.

The question whether or not successive and additional measures applied post-TRC in South Africa are in line with both national and international law can be answered with reference to the controversy surrounding the development and implementation of the afore-mentioned measures as well as the lack of commitment and poor progress thus far.

As became obvious in this study, there is no political will to prosecute *apartheid* era crimes which raises broader concerns regarding political interference threatening the independence of the judiciary. This blatant disregard of an earlier "commitment" to post-TRC prosecutions and failure to comply with the duty to prosecute, results in impunity for political offences which has profound implications for the respect for the rule of law. Also impacting negatively on the rule of law in the context of this study is Presidential pardons which has the effect of overturning of any judicial sentence, and in so doing defeats the purpose of prosecutions in that convicted perpetrators do not face the consequences of their actions, retain their criminal records and serve out their sentences. The way in which South Africa has been dealing with post-TRC prosecutions and Presidential pardons to date is therefore clearly not in compliance with both national and international law.

The trend of not implementing successive measures in the aftermath of initial measures such as an amnesty scheme set by other countries will probably be continued in South Africa unless its initiatives post-TRC are made the subject of extensive national and international scrutiny.

2 The way forward

The process of transformation, reconciliation, development and reconstruction of the South African society was not finalised when the TRC and the Amnesty Committee reached the end of its mandates.

South Africa is a country still in its democratic adolescence and fragile in its development. Time alone does not heal wounds; the entire process is delicate and requires a long-term commitment. This includes the implementation of successive measures in the form of post-TRC prosecutions and it is submitted that the ongoing

transformation process will be jeopardised with inappropriate additional measures such as Presidential pardons.

Future societies in transition can benefit from the South African experience by regarding its achievements as positive contributions and its shortcomings as negative contributions. How this matter is currently unfolding is therefore of particular interest to the international community and, once again, South Africa has the opportunity to set the standard for other societies in transition that may decide to follow suit. Such societies' choices of measures dealing with past abuses are more likely to be effective if they are based on a serious examination of other societies' experiences as they emerged from a period of abuse. This reduces the likelihood of repeating avoidable errors – errors transitional societies can hardly afford to make.

3 Concluding remarks

The question of prosecuting *apartheid* era crimes is, according to critics, politically loaded, as some believe that they are necessary to conclude the TRC process, while others feel they could destroy reconciliation. Clearly the issue is controversial and to satisfy all stakeholders is an unrealistic goal and impossible task at that, and therefore certain compromises and sacrifices will have to be made within a legal framework and after proper consultation with all stakeholders.

Essentially an amnesty process through a forum such as the TRC is not similar to a prosecuting process through a prosecuting authority, but both processes should work towards a common goal and that is to contribute to (not undermine) transformation, reconciliation, development and the reconstruction of society. Avoiding vengeance, retaliation and victimisation in politically loaded prosecutions will be another mature step towards healing a nation.

SUMMARY

This study provides an overview of how the post-TRC phase in South Africa has unfolded to date and addresses the question as to whether or not prosecutions and Presidential pardons as successive and additional measures to the initial TRC amnesty scheme are in compliance with both national and international law.

Not only does this study aim to contribute to a better understanding of the challenges a society in transition faces in the aftermath of initial measures in the form of amnesty, it also aims to provide guidance to future societies in transition and reduce the likelihood of repeating avoidable errors – errors transitional societies can hardly afford to make.

It has been established that in the context of this study, all hope is usually placed on initial measures in the form of amnesty, and that very few countries have had the necessary foresight and have placed sufficient emphasis on the fact that more than one measure, implemented either simultaneously or individually, is usually necessary for successful, comprehensive and sustained transition and reconciliation. The result hereof is that successive measures in the form of prosecutions in the aftermath of an amnesty scheme are rarely implemented despite the fact that prosecutions are regarded as the only credible alternative to amnesty and despite a duty to prosecute, be it national or international, resting on the relevant country.

The main reason identified for the above-mentioned result is the lack of political will to prosecute perpetrators of crimes committed with a political objective which raises broader concerns regarding political interference threatening the independence of the judiciary. This became evident in the *Nkadimeng*-challenge where the South African Government's prosecution initiative, namely the amendment of the National Prosecutions Policy aimed at providing guidelines to balance the sensitivities of national reconciliation in the prosecuting process, was held to constitute "prosecutorial indemnity" and consequently declared unconstitutional and invalid.

This blatant disregard of an earlier "commitment" to post-TRC prosecutions and failure to comply with the duty to prosecute results in impunity for political offences, which has profound implications for the respect for the rule of law, and it may signal to future perpetrators that the consequences of not seeking amnesty may be minimal.

Various substantial and procedural issues relating to post-TRC prosecutions and appropriate sentencing were further identified. Pertaining to prosecutions, these issues were found to be the result of either Government's failure to make sufficient provision in its strategic plan and budget for law enforcement, the judiciary in general and for post-TRC prosecutions in particular, or the fact that many of the *apartheid* era crimes were committed more than three decades ago. With regard to sentencing, a victim-centred approach within a restorative justice framework and the judicial recognition of the indigenous legal approach to punishment were supported.

Additional measures, that of Presidential pardons in terms of section 84(2) of the *Constitution* and effected by the Special Pardons Process were further scrutinised in this study. This initiative was aimed at dealing with pardon applications from persons convicted for offences they claim were politically motivated, but who, for various reasons, did not participate in the TRC.

In *CSVR v The President of the Republic of South Africa* the essence of the challenge was whether or not the President's pardoning power constituted administrative action requiring him, save in exceptional circumstances, to afford all interested parties a hearing before taking a decision. The significance of the Special Pardons Process for post-TRC prosecutions and the appropriateness thereof as mechanism to address *apartheid* era crimes in the aftermath of the TRC did, however, not receive attention.

This study was therefore also concerned with the compatibility of Presidential pardons with both national and international law. The fact of the matter is that the President can, by way of his pardoning power, overturn a judicial sentence, despite the constitutional guarantee in section 165(5) of the *Constitution* which determines that a judicial sentence "binds all persons to whom and organs of state to which it applies". This was found to infringe upon a number of fundamental rights including sections 34 and 35 of the *Constitution*. This consequence also impacts negatively

on the rule of law in that convicted perpetrators do not face the consequences of their actions, do not retain their criminal records and do not serve out their sentences.

Furthermore, this power has been restricted by custom and convention and was also found not to be compatible with the separation of powers in a modern constitutional state because the residual nature of the power impinges upon the domain of the judiciary. It is argued in this study that post-TRC issues do not constitute exceptional circumstances under which the President should exercise his pardoning power for it flies in the face of the negotiated settlement reached in 1994, the TRC, victims, perpetrators who came forward and complied with the necessary requirements as well as fellow South Africans who had to learn to accept the terms and conditions of the settlement and invest in the TRC process aimed at national reconciliation. With reference to the international scrutiny of Presidential pardons applied in Argentina, and the eventual declaration of the unlawfulness of this measure, it is suggested that South Africa draw on the Argentinean experience with regard to the appropriateness and constitutionality of "Presidential pardons" as measure to bring closure on matters relating to convictions of those perpetrators who allegedly committed crimes with a political objective.

In this study, successive and additional measures applied post-TRC in South Africa are held not to be in line with both national and international law based on the controversy surrounding the development and implementation of post-TRC prosecutions and Presidential pardons and on the lack of commitment and poor progress thus far.

The trend of not implementing successive measures in the aftermath of initial measures such as an amnesty scheme set by other countries will probably be continued in South Africa and followed by future societies in transition unless its initiatives post-TRC are made the subject of extensive national and international scrutiny.

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